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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, WINTON LEONG, and EDWIN SHIMODA,
Petitioners,

VS.

DELBERT KAAHANUI WAKINEKONA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether state-created prisoner pre-transfer hearing rules, which do not limit or proscribe prison official discretion in any way, trigger the Due Process Clause of the United States Constitution?

2. Whether state-created regulations guaranteeing prisoners specified procedural protections before any transfer involving a potential "grievous loss" and defining an interstate transfer as a "grievous loss," but which contain no standards proscribing official discretion in any way, create a liberty interest subject to due process protection?

3. Whether the allegation that a prisoner was denied an independent hearing body guaranteed by State regulations, where the hearing body merely makes a recommendation to the ultimate decision-maker whose discretion is not proscribed or limited in any way by the recommendation, states a claim under 42 U.S.C. § 1983?

LIST OF PARTIES AFFECTED

Except for the persons listed in the caption, there are no other parties affected by this case.

TABLE OF CONTENTS

	Page
Questions presented for review	i
List of parties affected	i
Opinions below	1
Jurisdiction	2
Constitutional provision involved	2
Statutes involved	3
Statement of the case	3
Regulation involved	3
Existence of jurisdiction below	5
Reasons for granting the writ	5
I	
The closely divided Ninth Circuit decision conflicts with its own prior opinions and the opinions of every other court to have considered the constitutional effect of procedural rules	5
II	
The Ninth Circuit decision involves important questions regarding the nature of due process rights, in the context of state-guaranteed procedural regulations, which have not been, but should be, settled by this court	8
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases

	Page
Bills v. Henderson, 631 F.2d 1287 (6th Cir. 1980)	7
Bishop v. Wood, 426 U.S. 341 (1976)	8, 9
Boothe v. Hammock, 605 F.2d 661 (2d Cir. 1979)	7
Cofone v. Manson, 594 F.2d 934 (2d Cir. 1977)	7
Four Certain Unnamed Inmates of Mass., Etc., v. Hall, 550 F.2d 1291 (1st Cir. 1977)	7
Hayward v. Henderson, 623 F.2d 596 (9th Cir. 1980)	6, 9
Jacobson v. Hannifin, 627 F.2d 177 (9th Cir. 1980)	6
Lake Mich. Col. Fed. of Teach. v. Lake Mich. Com. Col., 518 F.2d 1091 (6th Cir. 1975), cert. denied, 427 U.S. 904 (1976)	7
Lombardo v. Meachum, 548 F.2d 13 (1st Cir. 1977)	6, 9
Lono v. Ariyoshi, Hawaii, 63 Haw. ....., 621 P.2d 976 (1981)	5, 6, 10
Peterson v. Davis, 421 F.Supp. 1220 (E.D. Va. 1976), aff'd, 562 F.2d 48 (4th Cir. 1977)	7
Pugliese v. Nelson, 617 F.2d 916 (2d Cir. 1980)	7
Sherman v. Yakahi, 549 F.2d 1287 (9th Cir. 1977)	9
Suckle v. Madison General Hospital, 499 F.2d 1364 (7th Cir. 1974)	8, 9
Wakinekona v. Olim, 459 F. Supp. 473 (D.Hi. 1978)	2

Constitution

United States Constitution:
Fourteenth Amendment 2, 4, 6, 8, 9

TABLE OF AUTHORITIES CITED

Page

Statutes

Hawaii Revised Statutes, Section 353-18 3

42 U.S.C. Section 1983 ..... i, 3, 5

Rules and Regulations

Rule IV, Supplemental Rules and Regulations of the Corrections Division of the State of Hawaii 3, 4, 5, 6

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners Antone Olim, Edith M. Wilhelm, John Smythe, Winton Leong, and Edwin Shimoda, respectfully pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit in the above case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is attached to this Petition as Appendix A.

Its Order and Amendment of Opinion is attached hereto as Appendix B. That decision reversed the judgment of the United States District Court for the District of Hawaii, attached hereto as Appendix C.

The Ninth Circuit decision was published in the advance sheets as 646 F.2d 378, but was withdrawn from the bound volume at the request of the court. The District Court of Hawaii decision was published as *Wakinekona v. Olim*, 459 F. Supp. 473 (D.Hi. 1978).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 26, 1981 (Appendix A, at A-1). The judgment was amended on November 27, 1981 (Appendix B, at B-1). The Petitioners' Motion for Reconsideration and Suggestion for Rehearing *En Banc* was denied on November 27, 1981 (Appendix B, at B-1). The majority of the Ninth Circuit voted against rehearing (Appendix B, at B-1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Hawaii Revised Statutes, Section 353-18:

> § 353-18 *Transfer of prisoner to federal institution.* The director of social services shall, with the approval of the governor, effect the transfer of a state prisoner to any federal correctional institution for imprisonment, subsistence, care, and proper employment of such a prisoner.

42 U.S.C. § 1983, *Civil action for deprivation of rights:*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

REGULATION INVOLVED

Rule IV of the Supplemental Rules and Regulations of the Corrections Division of the State of Hawaii, which is the subject of the Petition, is attached hereto as Appendix D.

STATEMENT OF THE CASE

Respondent, sentenced to life imprisonment without parole by a Hawaii state court, was an inmate of the maximum control unit of the Hawaii State Prison. "He is considered to be the most dangerous and assaultive inmate in the Hawaii prison system." Appendix A, at A-2.

On August 10, 1976, Respondent appeared before a prison program committee to evaluate his overall prison placement, including the possibility of a mainland transfer. After the hearing, the committee recommended to the prison administrator that Respondent be transferred to the mainland. Appendix A, at A-2.

The prison administrator affirmed the recommendation and transferred Respondent to Folsom State Prison in California. Under Rule IV, the administrator had plenary and unfettered discretion to "[a]ffirm or reverse, in whole or in part, the recommendation" of the program committee. Appendix D, at D-5.

Respondent filed suit in the United States District Court for the District of Hawaii, alleging, *inter alia*, that the procedures adhered to in his transfer hearing were in violation of the Due Process Clause of the United States Constitution.

The District Court dismissed the complaint on the ground that, under Rule IV (Appendix D), the prison administrator had unlimited discretion, not subject to standards governing the exercise thereof, to transfer prisoners to the mainland. It therefore concluded that since Respondent's transfer did not implicate a constitutionally protected liberty interest, due process did not attach. *See* Appendix C.

The United States Court of Appeals for the Ninth Circuit, in a split (2 to 1) decision, reversed on the ground that the right to a state-guaranteed procedural hearing in Rule IV creates a "justifiable expectation" in having a hearing before transfer and thus triggers the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *See* Appendix A. The Ninth Circuit nevertheless

recognized that its conclusion was in conflict with the "First, Second, and Sixth Circuits." Appendix A, at A-7.

Petitioners filed a Motion for Reconsideration and Suggestion for Rehearing *En Banc* alleging, *inter alia*, that a recent Hawaii Supreme Court case (*Lono v. Ariyoshi*, Hawaii, 63 Haw. ...., 621 P.2d 976 (1981) (Appendix E hereto)) held that Rule IV's hearing procedure did not trigger due process protections:

> Thus . . . Rule IV of the Rules did not clothe plaintiff with the requisite liberty interest which would have triggered the application of the procedural requirements under the fourteenth amendment of the United States Constitution. Appendix E, at E-11.

The Ninth Circuit denied the motion in a split, 2 to 1, decision on November 27, 1981. *See*, Appendix B.

Your Petitioners now seek a Writ of Certiorari.

EXISTENCE OF JURISDICTION BELOW

The prisoner Respondent invoked the jurisdiction of the District Court below by a complaint under 42 U.S.C. § 1983, alleging a violation of the Due Process Clause of the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

I

THE CLOSELY DIVIDED NINTH CIRCUIT DECISION CONFLICTS WITH ITS OWN PRIOR OPINIONS AND THE OPINIONS OF EVERY OTHER COURT TO HAVE CONSIDERED THE CONSTITUTIONAL EFFECT OF PROCEDURAL RULES

The Ninth Circuit's closely divided, 2 to 1, decision stands alone in holding that procedural rules trigger due process

protections. As Circuit Judge Goodwin lamented in his dissent below:

> Because I agree with the reasoning of the first and second circuits, *I must respectfully dissent from the majority's unnecessary creation of a conflict among the circuits on this point.* (Emphasis added) Appendix A, at A-14.

It is therefore imperative to grant certiorari to eliminate the irreconcilable conflict among the courts on this issue.

Firstly, the Ninth Circuit decision conflicts with its own prior holdings that "[p]rocedural guarantees ordinarily do not transform a unilateral expectation into a constitutionally protected interest." *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980). *Accord, Hayward v. Henderson*, 623 F.2d 596, 597 (9th Cir. 1980). (Right to CETA procedural protections before termination "does not establish a property interest.").

Secondly, the Ninth Circuit decision conflicts with the Hawaii Supreme Court which held that Rule IV "did not clothe plaintiff with the requisite liberty interest which would have triggered the application of the procedural requirements under the fourteenth amendment of the United States Constitution." *Lono v. Ariyoshi, supra.* Appendix E, at E-11. The Ninth Circuit held that "[on] that federal question [*i.e.*, the Fourteenth Amendment], we respectfully disagree with the Supreme Court of Hawaii." Appendix B, at B-3.

Thirdly, every other Circuit Court of Appeals which has ruled on this issue disagrees with the Ninth Circuit:

> *FIRST CIRCUIT: Lombardo v. Meachum*, 548 F.2d 13, 15-16 (1st Cir. 1977) (Where there are no substan-

tive limitations on an administrator's discretion, the right to procedural safeguards does not create substantive protections.); and *Four Certain Unnamed Inmates of Mass., Etc., v. Hall*, 550 F.2d 1291, 1292 (1st Cir. 1977) ("Prison regulations which grant a right to hearings prior to transfer do not trigger the Due Process Clause.").

SECOND CIRCUIT: Cofone v. Manson, 594 F.2d 934, 938 (2d Cir. 1977) (No liberty interest "entitlement can derive from a statute that merely establishes procedural requirements."); *Boothe v. Hammock*, 605 F.2d 661, 664-665 (2d Cir. 1979) ("The State *procedural* requirements that he alleges have not been observed do not create interests entitled to due process protection . . . ."); and *Pugliese v. Nelson*, 617 F.2d 916, 824 (2d Cir. 1980).

FOURTH CIRCUIT: Peterson v. Davis, 421 F.Supp. 1220 (E.D. Va. 1976), *aff'd*, 562 F.2d 48 (4th Cir. 1977) (Affirmed a decision which held that promulgated transfer hearing procedures do not trigger due process and thus hearings were "not constitutionally required.").

SIXTH CIRCUIT: Lake Mich. Col. Fed. of Teach. v. Lake Mich. Com. Col., 518 F.2d 1091, 1095 (6th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976) (Right of public employee to pre-termination hearing does not rise to "the level of a protected property interest" because the regulation contains no "substantive grounds for discharge, and it gives no assurances, conditional or otherwise, of continued public employment."); and *Bills v. Henderson*, 631 F.2d 1287, 1298 (6th Cir. 1980) ("[P]rocedural rules created by state administrative bodies cannot, of themselves, serve as a basis for a separate protected liberty interest.").

SEVENTH CIRCUIT: Suckle v. Madison General Hospital, 499 F.2d 1364, 1366 (7th Cir. 1974) ("Procedural protections or the lack thereof do not determine whether a property right exists. . . . Rather, plaintiff must show a substantive restriction on the hospital's discretion, namely, that reappointment may be denied only for certain reasons under state law.").

The Ninth Circuit opinion, however, held that "[to] the extent that these cases [*i.e.*, those of the First, Second and Sixth Circuits] may be read as holding that no procedural requirements can create a substantive liberty interest, unless the events which may cause a transfer are specified in those requirements, *we must disagree.*" (Emphasis added.) Appendix A, at A-7.

Finally, the Ninth Circuit conflicts with this court's opinion in *Bishop v. Wood*, 426 U.S. 341 (1976), which squarely held that the denial of state-required pre-termination procedures "did not deprive him [the discharged employee] of a property interest protected by the Fourteenth Amendment."

The Ninth Circuit's conflict with the rest of the nation can and should be remedied at this time by this court.

II

THE NINTH CIRCUIT DECISION INVOLVES IMPORTANT QUESTIONS REGARDING THE NATURE OF DUE PROCESS RIGHTS, IN THE CONTEXT OF STATE-GUARANTEED PROCEDURAL REGULATIONS, WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The considerable confusion generated by the Ninth Circuit's decision, in its diametric opposition to every other

opinion on the subject, is clear. The decision not only fosters confusion and frustration in the law of due process, but also in the day-to-day administration of government agencies, whether they be prisons, schools, police departments, or any other agency that operates under procedural regulations. The need for a decision at the national level is obvious and of paramount importance.

A review of the case law indicates that government agencies often create the right to pre-termination or pre-transfer hearing procedures. In all of these cases, with the exception of the one below, it was concluded that so long as the rules confer discretion, no liberty interest is implicated in the exercise of that discretion. To rule otherwise would result in the constitutionalization of state procedural rules and regulations.

The range and impact of such a constitutionalization would be immense. It would expand the boundaries of the Due Process Clause far beyond those contemplated by this court, for example, in *Bishop v. Wood, supra.* It would, in effect, establish the right to constitutional due process prior to: the termination of the policeman in *Bishop v. Wood, supra*; the transfer of the prisoners in *Lombardo v. Meachum, supra*; the termination of the probationary employee in *Sherman v. Yakahi*, 549 F.2d 1287, 1291 n. 8 and 9 (9th Cir. 1977); the termination of the CETA employee in *Hawyard v. Henderson, supra*; or the denial of hospital reappointment in *Suckle v. Madison General Hospital, supra.*

To allow the Ninth Circuit decision to stand would be to uphold the Court's "unnecessary creation of a conflict

among the circuits on this point." Dissent of Circuit Judge Goodwin, Appendix A, at A-14. It would also have a major impact upon the State of Hawaii since many inmates have been transferred to the mainland since Wakinekona's transfer.

It further reverses the Hawaii Supreme Court opinion in *Lono, supra,* Appendix E, and, therefore, works an injustice on the axiom that federal courts ought to defer to state courts the interpretation and operative effect of state rules and regulations.

For these reasons, the issue before this court on certiorari is of national significance and is one which demands resolution at this time.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be GRANTED.

Dated: Honolulu, Hawaii, February, 1982.

Respectfully submitted,

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State of Hawaii
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Attorney for Petitioners

(Appendices follow)

Appendix A

Delbert Kaahanui Wakinekona,
Plaintiff/Appellant,

v.

Antone Olim, Edith M. Wilhelm, John Smythe,
Winton Leong and Edwin Shimoda,
Defendants/Appellees.

No. 78-3092.

United States Court of Appeals,
Ninth Circuit.

Submitted Aug. 14, 1980.
Decided May 26, 1981.

Appeal from the United States District Court
for the District of Hawaii

Before: GOODWIN, FLETCHER and CANBY,
Circuit Judges.

CANBY, Circuit Judge.

In August 1976, Delbert Kaahanui Wakinekona sought to challenge his transfer from Hawaii State Prison to Folsom State Prison in California. Wakinekona sued in the Federal District Court for the District of Hawaii under 42 U.S.C. § 1983, alleging that he was transferred in violation of the due process clause of the fourteenth amendment. The district court dismissed his complaint, holding that the Hawaii statutes and regulations governing prison transfers did not create a substantive liberty interest protected by the due

process clause. Wakinekona appealed the resulting judgment. We reverse the decision of the district court, 459 F.Supp. 473.

I.

Wakinekona was an inmate of the Hawaii State Prison, sentenced to life imprisonment and confined to the maximum control unit. On August 2, 1976, he appeared at a program classification hearing, the stated purpose of which was to determine the reason for the failure of programs within the maximum control unit. As a result of that hearing. Wakinekona was one of two inmates singled out as troublemakers. On August 5, he received notice that the prison program committee would consider at an August 10 hearing whether he should be transferred to another prison in Hawaii or to a mainland prison. The August 10 hearing was conducted by the same persons who presided at the August 2 hearing. The program committee decided that Wakinekona should be transferred to Folsom because of reports that he frequently threatened and intimidated prison guards. Wakinekona was transferred to Folsom. The notice to California prison authorities stated that Wakinekona "has a background of aggravated battery and a history of escape from prison. He is considered to be the most dangerous and assaultive inmate in the Hawaii prison system. . . ."

Wakinekona claimed that his transfer violated the due process clause because the committee which decided to transfer him was biased against him. He alleged that the committee was composed of the same persons who initiated the transfer proceedings, in direct violation of Hawaii

prison regulations. The regulations require that an impartial committee make such decisions, and specifically exclude from the committee any persons who were actively involved in initiating the transfer proceedings. Wakinekona argued that because he was denied a hearing before an impartial tribunal, his transfer violated the due process clause. The district court found, however, that the prison transfer regulations did not create a substantive liberty interest protected by the due process clause, and dismissed his complaint.

II.

In *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed. 2d 451 (1976), and *Montanye v. Haymes*, 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 446 (1976), the Supreme Court held that prison transfers do not automatically trigger the protections of the due process clause. The gist of those decisions was that the day-to-day functioning of state prisons is the business of the states, not of federal judges. Therefore, the Court held that the due process clause does not impose a nationwide rule requiring hearings before all prison transfers. *Fano*, 427 U.S. at 229, 96 S.Ct. at 2540. The court also recognized, however, that individual states are free to require prison transfer hearings by statute or by regulation. Hawaii has enacted a set of prison transfer regulations. They clearly condition prison transfers involving a "grievous loss" upon a hearing by an impartial committee established by the prison administrator. Art. IV(2), Supplementary Rules & Regulations of the Corrections Division, Department of Social Services & Housing, State of Hawaii. The regulations also define an inter-

state as a "grievous loss". The question we face is whether an interstate prison transfer falling within the scope of these regulations invokes the protections of the due process clause.

The result in *Fano* and *Haymes* depended upon two factors. First, the Court rejected the idea that *any* "grievous loss" imposed upon a prisoner implicates due process. The Court stated that not every change in the conditions of the confinement of an inmate is of constitutional magnitude. The Court concluded that the intrastate transfers involved in *Fano* and *Haymes* did not implicate due process because "confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose." *Fano,* 427 U.S. at 225, 96 S.Ct. at 2538. Second, the Court found that the state laws and regulations governing intrastate prison transfers did not create a substantive liberty interest. The Court stated that a substantive liberty interest might be created by the state if there were "some right or justifiable expectation rooted in state law that [the inmate] will not be transferred except for misbehavior or upon the occurrence of other specified events." *Haymes,* 427 U.S. at 242, 96 S.Ct. at 2547. The Court could find no such right or expectation in the statutory schemes of Massachusetts or New York.

The Court expanded upon its analysis of prison transfers in *Vitek v. Jones,* 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), which dealt with the transfer of an inmate from prison to a mental hospital. The Court held that such a transfer triggered the application of the due process clause for two independent reasons: (1) it involved the imposition

of qualitatively different conditions beyond the range of those justified by the conviction and sentence; and (2) state law gave rise to a liberty interest by creating an objective expectation that a prisoner would not be transferred to a mental hospital unless he suffered from a mental disease or defect that could not be adequately treated in prison.

We need not address the question whether transfer of a prisoner from Hawaii to California involves such qualitatively different conditions that it exceeds the range of confinement justified by his sentence,[1] because we conclude that the Hawaii prison regulations created a liberty interest subject to due process protection.

III.

In *Fano* and *Haymes*, the Supreme Court found that the state laws governing prison transfers did not create a substantive liberty interest. "Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct." *Fano*, 427 U.S. at 226, 96 S.Ct. at 2539. Under New York law, a prisoner "had no right to remain at any particular prison facility and no justifiable expecta-

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[1]This court has held that an inmate's transfer from Hawaii State Prison to a state prison in California does not raise any constitutional issues. *Hillen v. Director of Department of Social Services*, 455 F.2d 510, 511 (9th Cir. 1972); *see also Fajeriak v. McGinnis*, 493 F.2d 468 (9th Cir. 1974) (involving transfers from Alaska to other states). These cases preceded *Fano*, *Meachum* and *Vitek*, however. Interstate transfers were also held not to implicate due process in *Sisbarro v. Warden*, 592 F.2d 1, 3 (1st Cir. 1979) and *Cofone v. Manson*, 594 F.2d 934, 937 n.4 (2d Cir. 1979). These cases were decided after *Fano* and *Meachum* but before *Vitek*.

tion that he would not be transferred unless found guilty of misconduct." *Haymes*, 427 U.S. at 243, 96 S.Ct. at 2547. The Court therefore concluded that

> no legal interest or right of these respondents under [state] law would have been violated by their transfer whether or not their misconduct had been proved in accordance with procedures that might be required by the Due Process Clause in other circumstances.

Fano, 427 U.S. at 228, 96 S.Ct. at 2540.[2]

The Hawaii prison transfer regulations differ substantially from the statutory schemes addressed by the Supreme Court in *Fano* and *Haymes*. The regulations require that an elaborate procedure will be followed whenever a prison transfer involves a "grievous loss" to the prisoner. Other courts have recognized that the existence of certain procedures may create an expectation protected by the due process clause. *Lokey v. Richardson*, 600 F.2d 1265, 1266 (9th Cir. 1979); *Lamb v. Hutto*, 467 F.Supp. 562, 566 (E.D. Va. 1979); *see Sherman v. Yakahi*, 549 F.2d 1287, 1292 (9th Cir. 1977). We believe that the regulations in this case create a justifiable expectation that a prison transfer in-

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[2]New York required no hearing before prison transfers. *Haymes*, 427 U.S. at 243, 96 S.Ct. at 2547. Massachusetts required no hearing by statute, and it is not clear whether that state required transfer hearings by regulation. *Fano*, 427 U.S. at 226-27, 96 S.Ct. at 2539, 2540. Fano did receive a hearing before his transfer. *Fano v. Meachum*, 520 F.2d 374, 376-77 (1st Cir. 1975), *rev'd*, 427 U.S. 215, 96 S.Ct. 2543, 49 L.Ed.2d 446 (1976). The First Circuit opinion in *Fano* mentions only a regulation requiring disciplinary hearings at Walpole State Prison. *Id.* at 379-80. Fano, however, was confined at Norfolk State Prison, and that regulation would not apply to his transfer, even if it could be considered to be disciplinary.

volving a "grievous loss" will not be carried out unless certain procedures are followed.

The First, Second, and Sixth Circuits have rejected claims that procedures mandated by particular prison transfer regulations create a liberty interest protected by the due process clause. *Lombardo v. Meachum*, 548 F.2d 13, 15 (1st Cir. 1977); *Cofone v. Manson*, 594 F.2d 934, 938 (2d Cir. 1979); *Bills v. Henderson*, 631 F.2d 1287, 1298-99 (6th Cir. 1980). To the extent that these cases may be read as holding that no procedural requirements can create a substantive liberty interest, unless the events which may cause a transfer are specified in those requirements, we must disagree.[3] The real issue is whether the transfer regulations create an entitlement to procedural protections. *See Greenholtz v. Inmates*, 442 U.S. 1, 12, 99 S.Ct. 2100, 2106, 60 L.Ed.2d 668 (1979).

The Hawaii regulations clearly guarantee prisoners specified procedural protections before any transfer involving a "grievous loss," and they define an interstate transfer as a "grievous loss." The regulations require that such transfers be considered by an impartial committee. The prisoner subject to transfer is entitled to prior notice of the hearing at which the committee will consider his transfer. The notice must state "what the Committee will consider at the hearing," and "any recent specific facts which

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[3] In *Lombardo*, the First Circuit interpreted the Massachusetts statutory scheme as not creating a substantive liberty interest protected by the due process clause. The court conceded, however, that a Massachusetts court might come to the opposite conclusion. 548 F.2d at 15 n.3.

may weigh significantly in the classification process." The prisoner has the right to examine all relevant, non-confidential material related to his case, a right to confront and cross-examine witnesses, a right to retain counsel and a right to respond to the evidence presented to the committee and to offer evidence on his own behalf. The regulations require that the committee "render a recommendation based only upon evidence presented at the hearing to which the individual had an opportunity to respond or any evidence which may subsequently come to light after the formal hearing." These regulations are not without substantive content. Their clear import is that a transfer will not be carried out absent a hearing directed to proof of the facts alleged in the notice received beforehand by the prisoner. In our view, these regulations create a justifiable expectation that a prisoner will not be transferred absent the specified procedures. They consequently give rise to a constitutionally protected liberty interest.

Our conclusion is reinforced by the fact that the regulations are clearly designed to protect a substantial interest of prisoners. The regulations limit the discretion of prison officials to transfer prisoners whenever a transfer involves a "grievous loss." Nor does our conclusion change because the regulations provide that the decision of the committee is merely advisory to the prison administrator, who can "[a]ffirm or reverse, in whole or in part, the [committee's] recommendation." The state argues that the quoted clause gives the prison administrator unfettered freedom to transfer inmates so that they are in fact transferable at will within the meaning of *Fano* and *Haymes*.

This argument grossly undervalues the procedural conditions which the state has imposed upon the actions of the prison administrator. The regulations certainly do not contemplate a transfer at the will of the prison administrator. He may act only after an impartial committee, from which he is excluded, has made a recommendation based upon facts specified in the notice of transfer hearing and proved at that hearing. The whole purpose of such procedural requirements is to protect against arbitrary or uninformed action by the prison administrator. *See Accardi v. Shaughnessy*, 347 U.S. 260, 267, 74 S.Ct. 499, 503, 98 L.Ed. 681 (1954). That goal cannot be reduced to constitutional insignificance.

We do not mean to suggest that every minor violation of prison transfer regulations will violate due process. First, it must be determined in a particular case whether the transfer regulations create an entitlement to specified procedures. Second, a deviation from the transfer regulations will assume constitutional proportions only when it affects the fairness of the process established by the regulations. *Cf. Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972). Wakinekona claims that prison officials deprived him of the independent decisionmaker guaranteed by the regulations because the committee which recommended his transfer also initiated the transfer proceedings. An impartial tribunal is one of the mainstays of procedural fairness. *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, 93 S.Ct. 80, 83-84, 34 L.Ed.2d 267 (1972). We therefore agree with Wakinekona that in alleging that he was deprived of the independent decisionmaker re-

quired by prison regulations, he has stated a claim under 42 U.S.C. § 1983. The district court erred in dismissing his claim pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.

REVERSED AND REMANDED.

GOODWIN, Circuit Judge, dissenting.

The issue is not whether Hawaii's prison authorities should transfer state prisoners without certain formalities,[1] but whether the federal constitution compels the state officers to follow to the letter those local regulations that provide inmates with an "impartial program committee" hearing if a change in prison classification results "in a grievous loss." Because I can find no federal constitutionally-protected interest in having the state follow its own rules in this case, I would affirm the district court's dismissal of this prisoner's § 1983 challenge.

Meachum v. Fano, 427 U.S. 215, 224, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976), reasoned that it is the nature, rather than the weight, of the individual interest at stake that involves due process. Thus *Meachum* held that the federal constitution does not apply to transfers of inmates "absent some right or justifiable expectation rooted in state law that [the inmate] will not be transferred except for misbehavior . . upon the occurrence of other specified events." *Montanye v. Haymes*, 427 U.S. 236, 242 96 S.Ct. 2543, 2547,

[1]Redress for the alleged violation of prison rules may be available in state court, a possibility recognized by both the state and federal trial courts.

49 L.Ed.2d 446 (1976) (quoting *Meachum*)[2]. For appellant to succeed here, therefore, he ought to demonstrate the existence of a right rooted in state law that limits the prison administrator's discretion to transfer him to a California penitentiary.

No Hawaii statute or prison regulation imposes substantive limitations on the power of Hawaii's prison authorities to transfer a state prisoner to a California prison Wakinekona had argued that the prison regulations setting out specific procedures to precede interstate transfers provide the state law basis for a protected liberty interest. The district court held otherwise and I agree.

According to prison rules, a pre-transfer hearing must be held before an "impartial program committee" if a change in the prisoner's classification will cause the prisoner a "grievous loss." Art. IV Supplementary Rules and Regulations of the Corrections Division, Department of Social Services & Housing. Because the hearing scheme requires several elements frequently found in "due process" hearings, appellant argues that the existence of the procedural

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[2]*Meachum* and *Montanye* each involved intrastate prison transfers. But the first circuit's reasoning that their principles apply equally to interstate transfers is persuasive. *See Sisbarro v. Warden, Mass. State Penitentiary*, 592 F.2d 1 (1st Cir.), *cert. denied*, 444 U.S. 849, 100 S.Ct. 99, 62 L.Ed.2d 64 (1979). Although the burden to inmates will often be greater in interstate transfers, causing them more of a grievous loss, burden is no longer the determining factor for the purposes of ascertaining the procedural due process rights of transferred inmates. *Id.* at 2-3. Therefore, the distinction between interstate and intrastate transfers is irrelevant. *Id.; see also, Cofone v. Manson*, 594 F.2d 934 (2d Cir. 1979) (applying *Meachum* to a prison transfer across state lines).

scheme itself is enough to create a liberty interest in having each step of the procedure followed, even though the same correctional regulations give the administrator the power to disregard the judgment of the program committee, and Haw.Rev.Stat. 353-18[3] specifically empowers without limitation the Director of Social Services to transfer a state prisoner to a federal prison. Appellant cites no decision in support of his argument.[4]

The state's position, on the other hand, has ample support, beginning with *Meachum* itself. The prison regulations in effect when Fano was transferred "entitled" inmates to some kind of pre-transfer hearing. *Fano v. Meachum*, 520 F.2d 374, 379-80 (1st Cir. 1975), *reversed*, 427 U.S. 215, 96 S.Ct. 2543, 49 L.Ed.2d 446 (1976). Yet the Supreme Court refused to find on the record before it that state law created the claimed liberty interest. Recognition of the *Meachum* rationale led the first circuit subsequently

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[3] § 353-18 Transfer of prisoner to federal institution.

"The director of social services shall, with the approval of the governor, effect the transfer of a state prisoner to any federal correctional institution for imprisonment, subsistence, care, and proper employment of such prisoner."

[4] Moreover, the Hawaii Supreme Court found in *Tai v. Chang*, 58 Haw. 386, 570 P.2d 563 (1977), that the Hawaii Administrative Procedure Act did not entitle an inmate to a hearing prior to an interstate transfer of the prisoner to a federal penitentiary conducted under Haw.Rev.Stat. 353-18. The transfer at issue in that case occurred before the adoption of Regulation IV. But the state supreme court decided *Tai* after the promulgation of Regulation IV, and in doing so did not indicate that the regulation's existence changed matters. It would seem presumptuous for federal judges to tell the Hawaii court to hold hereafter that Regulation IV limits the director's discretion under § 353-18.

to refuse to base a protected liberty interest on state mandated pre-transfer procedural safeguards. *Lombardo v. Meachum*, 548 F.2d 13, 15-16 (1st Cir. 1977). *See also Four Certain Unnamed Inmates of Mass. etc. v. Hall*, 550 F.2d 1291 (1st Cir. 1977); *Daigle v. Hall*, 564 F.2d 884 (1st Cir. 1977). *Peterson v. Davis*, 421 F.Supp. 1220 (E.D.Va. 1976), *aff'd without opinion*, 562 F.2d 48 (4th Cir. 1977), likewise held that a state's practice of affording pre-transfer hearings does not turn such hearings into a constitutional requirement.

Even where statutes require out-of-state transfers to be accompanied by "all procedural safe-guards . . . to insure due process of law," or where statutes authorize certain transfers only when "in . . . [the Commissioner's] opinion, the inmate needs particular treatment or special facilities available at . . . [the transferee institution], or it is in the best interest of the state," no federal liberty interest has been found. *Cofone v. Mason*, 594 F.2d 934, 937-38 (2d Cir. 1979). The second circuit there concluded that the grant of transfer authority was too broad to support a justifiable expectation that an inmate would not be transferred without some specified event or findings.

> "Although a Due Process Clause liberty interest may be grounded in state law that places substantive limits on the authority of state officials, no comparable entitlement can derive from a statute that merely establishes procedural requirements. . . . Since § 18—78a(b) at most directs Connecticut officials to follow certain procedures in deciding whether to transfer Cofone, and does not substantively restrict their authority to order the transfer, it cannot be the source of any right or

justifiable expectation on Cofone's part that he would not be transferred absent misbehavior." 594 F.2d at 938-39.

Because I agree with the reasoning of the first and second circuits,[5] I must respectfully dissent from the majority's unnecessary creation of a conflict among the circuits on this point.

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[5]The cases cited by the majority are not controlling. They stand for the general proposition that federal and state agencies must abide by their own regulations. *See Accardi v. Shaughnessy*, 347 U.S. 260, 267, 74 S.Ct. 499, 503, 98 L.Ed. 681 (1954); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40, 79 S.Ct. 968, 972-73, 3 L.Ed.2d 1012 (1959). Even if this is a due process requirement, as the majority suggests, the question before this court is not whether the failure to follow the regulations violated due process, but whether the regulations created a liberty interest that could not be taken away without a hearing. Wakinekona raised only the latter point in his § 1983 complaint.

Confone v. Manson, 594 F.2d 934, 937 n.3 (2d Cir. 1979), held that the state regulations providing for a hearing did not give rise to a liberty interest so as to require a hearing as a matter of federal due process. The court noted that Confone had dropped the argument that his transfer deprived him of due process because it violated Connecticut's own regulations. *Lombardo v. Meachum*, 548 F.2d 13, 16 (1st Cir. 1977), also found that the regulations regarding hearings did not give rise to a liberty interest. The first circuit did not discuss *Accardi*-due process; presumably because it found that the district court did not abuse its discretion in concluding that the prison board fully complied with its regulations. I think the majority has confused these two due process points and has incorrectly concluded that the regulations created a liberty interest, thus requiring a particular type of hearing.

Appendix B

In the United States Court of Appeals
For the Ninth Circuit

No. 78-3092

DC No. 76-0286

Delbert Kaahanui Wakinekona,
Plaintiff-Appellant

vs.

Antone Olim, Edith M. Wilhelm, John Smythe,
Winton Leong and Edwin Shimoda,
Defendants-Appellees

ORDER
AND
AMENDMENT OF OPINION

[Filed Nov. 27, 1981]

Before: GOODWIN, FLETCHER and CANBY,
Circuit Judges

A majority of the panel having voted to deny the petition for rehearing, the petition is denied. Judge Goodwin dissents and would grant the rehearing.

The suggestion for rehearing en banc having failed to receive the affirmative vote of a majority of the active judges, rehearing en banc is denied.

The opinion previously filed in this case, slip op. at 2403 (May 26, 1981) is amended as follows:

1. Immediately after the notation in the heading "Decided May 26, 1981" (slip op. at 2403), add the following

notation: As Amended on Denial of Rehearing and Rehearing En Banc, ..., 1981."

2. In the last textual paragraph of the original majority opinion after the words ". . . by the regulations" and immediately preceding the citation to *Winnick v. Manning,* (slip op. at 2407) indicate an additional footnote number 4. In the margin, then add the following footnote:

> FOOTNOTE 4: We therefore disagree with the suggestion of the dissent that our ruling imposes a constitutional requirement that state officers follow local regulations "to the letter." *Infra,* p. ..... We simply hold that the particular detailed regulations in this case create a liberty interest, and that deprivation of that interest by a biased decision-maker violates the Fourteenth Amendment. *See* L. Tribe, American Constitutional Law 555 (1978). We have no occasion to rule on what other regulations may create a liberty interest or what other procedural deviations may violate due process. It goes without saying that it would be neither sound law nor desirable policy to constitutionalize every state prison regulation.

3. At the conclusion of the original majority opinion, after "REVERSED AND REMANDED" (slip op. at 2407), add the following supplementary material, along with its footnote number 5:

On Petition for Rehearing
and Suggestion for Rehearing En Banc

The State in its petition for rehearing directs our attention to *Lono v. Ariyoshi,* 621 P.2d 976 (Hawaii 1981). In that case the Supreme Court of Hawaii dealt with the same transfer regulations involved in the present case. It

held that no fourteenth amendment liberty interest was created by the regulations because the prison administrator had unlimited discretion to order a transfer or not. 621 P.2d at 980-81. With all due respect to the Hawaii Court's conclusion, we do not find it controlling here.

It is of course the sole prerogative of the highest state court to determine the meaning of a state statute or regulation. Once that meaning is determined, however, it is a federal question whether the interest created by the state statute or regulation is to be accorded protection under the fourteenth amendment. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9 (1978).

We do not read *Lono v. Ariyoshi* as having interpreted Regulation IV differently from this court. While the Hawaii Court points out, as did this court, that the prison administrator ultimately has complete discretion whether or not to transfer, the *Lono* opinion does not suggest any weakening of the preconditions required by the Regulation for the exercise of the prison administrator's discretion. We have held that those preconditions establish a liberty interest within the meaning of the fourteenth amendment, and we adhere to that holding. On that federal question, we respectfully disagree with the Supreme Court of Hawaii.

Nor do we think that the result in this case is affected by *Parratt v. Taylor*, ... U.S. ....., 101 S.Ct. 1908 (1981). *Parratt* dealt with the negligent loss of a $23 hobby kit by prison officials, and the Court held that the prisoner was not deprived of his property without due process where there was a state tort claims statute that could afford full redress. That type of post-deprivation hearing was suf-

ficient, in the Court's view, to satisfy the fourteenth amendment.

We do not believe that *Parratt* applies to the present case. The majority opinion in *Parratt* concentrates on the problems inherent in turning federal courts into forums for dealing with common law torts that are the regular business of state courts. 101 S.Ct. at 1917. The present case, dealing with a liberty interest, is of a wholly different nature. Indeed, Justice Blackmun's concurring opinion (joined by Justice White) in *Parratt* suggests that the *Parratt* ruling is confined to deprivation of property. 101 S.Ct. at 1918. In short, *Parratt* is simply a different case from the present one.

It is true that there is general language in the majority opinion in *Parratt* suggesting that where a deprivation occurs because a state *fails* to follow its procedure rather than *because* it follows its procedure, and there is a state court remedy, then the state has provided all the process that is due. 101 S.Ct. at 1917. But this statement must be read in the context in which it was made, that of a tortious deprivation of property for which the state provides a tort remedy. A broader reading that would apply to the present case would remit all § 1983 cases to state courts whenever the conduct complained of violated state law as well as the federal Constitution. The result would be to read into § 1983 a requirement of exhaustion that has consistently

been rejected by the federal courts.[5] *Monroe v. Pape*, 365 U.S. 167, 183 (1961); *Morrison v. Jones*, 607 F.2d 1269, 1275 (9th Cir. 1979), *cert. denied*, 445 U.S. 962 (1980); *Canton v. Spokane School District*, 498 F.2d 840, 844 (9th Cir. 1974). For this reason, also, we conclude that *Parratt* does not control the present case.

The petition for rehearing is denied. Judge Goodwin dissents and would grant the rehearing. The suggestion for rehearing en banc having failed to receive the affirmative vote of a majority of the active judges, rehearing en banc is denied.

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[5]It is also clear that *Parratt* cannot be read as holding that a state court remedy for a violation of the fourteenth amendment itself provides all the process that is due. The problems with such a circular proposition are insurmountable. Section 1983 actions may be brought in state court. *Martinez v. California*, 444 U.S. 277, 283-84 n.7 (1980); *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980). State courts are obligated to enforce applicable federal law. U.S. Const. art. VI, § 2. By entertaining § 1983 actions, a state court consequently provides a remedy for state deprivation of any federal right. To say that such a remedy provides all the process that is due from a state would be to deprive the federal courts of primary enforcement of any federal rights. *Parratt* of course evinces no such intention.

Appendix C

Delbert Kaahanui Wakinekona,
Plaintiff,

v.

Antone Olim, Edith M. Wilhelm, John Smythe,
Winton Leong and Edwin Shimoda,
Defendants.

Civ. No. 76-0286.

United States District Court,
D. Hawaii.

June 8, 1978.

MEMORANDUM AND ORDER

WONG, District Judge.

Defendants have moved for summary judgment pursuant to Rule 56, F.R.Civ.P., seeking a dismissal of plaintiff's First Amended Complaint. Defendants had previously moved to dismiss plaintiff's original complaint, which was denied by this court. Defendants, in effect, are asking this court to reconsider its previous order denying dismissal.

Plaintiff Wakinekona, sentenced to life imprisonment without parole by the Hawaii State court, was an inmate of the Hawaii State Prison confined to the maximum control unit. On August 2, 1976, Wakinekona appeared before a board designated as a Program Committee of the Hawaii State Prison for a hearing, the stated purpose of which was to determine the reason for which the programs at the maximum control unit of the Hawaii State Prison had failed. Three days later, he was served with a written

notice that he would have a further hearing to determine his program designation at the Hawaii State Prison, which included a possible transfer to an out-of-state penal facility. On August 10, 1976, a hearing was held on plaintiff's program classification before the same members of the same committee. The committee rendered its decision the next day and thereafter served a written copy of it to the plaintiff. Based on this decision, the plaintiff was transferred to Folsom State Prison in California.

In his First Amended Complaint, plaintiff claims, *inter alia*, that the decision rendered by the committee was violative of the due process clauses of the Fifth and Fourteenth amendments to the United States Constitution since it was "rendered by a board the composition of which was biased and prejudicial against the Plaintiff and consisted of persons who were directly responsible for the initiation of said hearing. . . ." Plaintiff further claims that his transfer violated the purpose of the program classification hearing which was governed by state regulations promulgated and issued by the Corrections Division of the Hawaii State Department of Social Services and Housing.

In its Memorandum and Order dated October 1, 1976, 421 F.Supp. 83, this court held that the hearing conducted on August 10, 1976 before a board consisting of the same members who sat on the August 2, 1976 committee violated plaintiff's constitutional right to due process. This court's holding was based on its reading of *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). In that case, the Supreme Court held that although the Constitution does not guarantee good-time credit for satis-

factory behavior while in prison, where the state itself provided a statutory right to good time and specifies that it is to be forfeited only for serious misbehavior, the prisoner has acquired an interest which "has real substance and is sufficiently embraced within the Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated. . . ." *Id.* at 2975.

In *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed. 2d 452 (1976), the Supreme Court held that the Due Process Clause does not protect a duly convicted prisoner against transfer from one institution to another within the state prison system. It asserted that *Wolff* was distinguishable because "The liberty interest protected in *Wolff* had its roots in [Nebraska] state law . . . ." *id.* at 2539, whereas in the *Fano* case, ". . . Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct." *Id.* at 2539.

In its October 1, 1976 Memorandum and Order, this court thought that *Fano* was "not on point because it does not involve a state-created right." It was pointed out that *Fano* held that a state prisoner is not entitled, under the Due Process Clause of the Fourteenth Amendment, "to a hearing when he is transferred to a prison the conditions of which are substantially less favorable to the prisoner, ***absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events.***" Citing from 96 S.Ct. at 2534, with emphasis added.

This court was then of the opinion that the State of Hawaii did create a right to plaintiff to a fair hearing by promulgation of the regulations by the Corrections Division.[1]

After this court issued its Memorandum and Order, the First Circuit Court of Appeals had occasion to address itself to the applicability of *Fano* in the context of prisoner rights created not by a state statute but by state departmental regulations not in effect at the time *Fano* was decided. In *Lombardo v. Meachum*, 548 F.2d 13 (1st Cir. 1977), the pertinent regulations provided that an inmate would receive some type of hearing before his reclassification. The regulations, however, did not impose standards limiting the discretion of prison authorities with respect to prisoner transfers. The Court therefore concluded that the regulations did not create "the kind of substantive interest which is required before a state created 'liberty' interest can be said to exist." *Id.* at 15.

In *Four Unnamed Inmates of Mass. Correctional Institution v. Hall*, 550 F.2d 1291 (1st Cir. 1977), the appellate court reversed the district court's order compelling the

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[1]Article IV of the "Supplementary Rules and Regulations of the Corrections Division," entitled "The Classification Process," declares that classification "never inflicts punishment; on the contrary, even the imposition of a stricter classification is intended to be in the best interests of the individual, the State, and the community." The inmate is granted the right to appear during the Program Committee hearing "if a change, modification, or transfer is planned which would result in a grievous loss." The "impartial Program Committee [is to be] composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee."

prison officials to give inmates notice of charges and disciplinary hearings. The district court was of the belief that the pertinent prison regulations severely restricted the discretion of prison officials to order transfers in the absence of misconduct. The court of appeals stated:

> But this circuit has recently held that the present prison regulations dealing with reclassification do not impose substantive standards on the decision to transfer an inmate. *Lombardo v. Meachum*, 548 F.2d 13 (1977). Freedom from transfer is not a "liberty interest" since an inmate may be transferred at the whim of the Commissioner. Because no "liberty interest" has been infringed by the transfer, due process does not attach, and the district court's order cannot stand.

This court is persuaded that the position taken by the First Circuit Court of Appeals is the correct one and that this court's original Memorandum and Order must be reversed. The prison authorities in Hawaii are granted practically unlimited discretion to transfer state prisoners. Section 353-18 of the Hawaii Revised Statutes provides:

> The director of social services shall, with the approval of the governor, effect the transfer of a state prisoner to any federal correctional institution for imprisonment, subsistence, care, and proper employment of such prisoner.

The pertinent Hawaii State regulations do not contain standards governing the administrator's exercise of such discretion. Indeed the regulations reserve in the administrator, "as the final decisionmaker," the right to affirm or reverse, wholly or partially, the recommendation of the Program Committee. Since Wakinekona's transfer did not

implicate a constitutionally-protected "liberty interest," due process did not attach. The First Claim for Relief alleging a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution must therefore be dismissed.

The First Claim for Relief also alleges a violation of the Hawaii State Constitution. The Second Claim for Relief claims a violation of the state regulations discussed earlier, and the Third Claim for Relief is grounded on an alleged "malicious and willful violation of state law." These claims arise exclusively under the state constitution, regulations, and statute. Here, as in *Lombardo v. Meachum, supra*, the sole basis for the exercise of federal jurisdiction over Wakinekona's state law claim was that, at the time the action was instituted, Wakinekona presented a substantial federal claim, and the state claim arose from the same nucleus of operative facts. In *Lombardo*, the court stated that its holding would require that the state law claims involved in that case be heard in the state court since there was no substantial federal due process claim to which such state law claims may be appended. This court concludes that Wakinekona's state claims must likewise be heard in the state court.

The plaintiff's First Amended Complaint is accordingly dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

So ordered.

Appendix D

IV

THE CLASSIFICATION PROCESS

1. *General:*

An inmate's/ward's classification determines where he is best situated within the Corrections Division. Rather than being concerned with isolated aspects of the individual or punishment (as is the adjustment process), classification is a dynamic process which considers the individual, his history, his changing needs, the resources and facilities available to the Corrections Division, the other inmates/wards, the exigencies of the community, and any other relevant factors. It never inflicts punishment; on the contrary, even the imposition of a stricter classification is intended to be in the best interests of the individual, the State, and the community. In short, classification is a continuing evaluation of each individual to ensure that he is given the optimum placement within the Corrections Division.

2. *Composition:*

The facility administrator shall establish an impartial Program Committee composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee. The facility administrator shall not sit as a member of the Committee.

3. *Procedure:*

So long as a transfer involves a grievous loss to the inmate/ward, the following procedures adhere. Grievous loss is generally defined as a serious loss to a reasonable man.

Thus, transfer from Hawaii State Prison to Kulani Honor Camp would normally not cause a grievous loss.

a. *Pre-hearing detention.* An inmate/ward should not be detained pending hearing longer than four working days, except where emergency conditions require a longer period of detention which shall be a reasonable time.

b. *Notice.* The inmate/ward has the right to prior notice that a Program Committee hearing will be held involving him.

(1) Within a reasonable time, not less than 24 hours prior to the hearing, the inmate/ward shall be served with written notice of the time and place of the Program Committee hearing and what the Committee will consider at the hearing. The notice should briefly state what the classification process involves, that it considers everything in his file, and any recent specific facts which may weigh significantly in the classification process. If the inmate/ward waives the 24 hour period, it shall be reduced to writing and signed by the inmate/ward on the face of the notice.

(2) The inmate/ward and/or his counsel substitute (as described below) shall have the opportunity to review all relevant nonconfidential information, that may be considered by the Committee, during the period between the notice and the hearing.

c. *Hearing.* The inmate/ward has a right to appear during the Program Committee hearing if a change, modification, or transfer is planned which would result in a

grievous loss. If the inmate/ward declines to attend the hearing, it shall be held regardless of his absence.

(1) The Committee shall explain the nature of the classification process and generally what the Committee is considering at the hearing.

(2) Evidence shall be presented to the Committee in the presence of the inmate/ward. The inmate/ward should be advised that he has a right to remain silent, but that his silence may be used as a permissible inference of evidence against him.

(3) *Confrontation and cross-examination:*

(a) The inmate/ward may be given the privilege to confront and cross-examine adverse witnesses.

(b) However, the Committee may deny confrontatation and cross-examination and identification of adverse witnesses if in its judgment to do so would:

(i) subject the witness(es) to potential reprisal;

(ii) jeopardize the security and/or good government of the facility; or

(iii) be otherwise unduly hazardous to the facility's safety or correctional goals.

(c) If confrontation and cross-examination and identification of adverse witnesses are denied, the Committee may, but is not required to, enter in the record of the proceeding and make available to the inmate/ward an explanation for the denial. Additionally, the inmate/ward shall be given an oral or written summary of the testimony against him and provided an opportunity to respond.

(4) *Opportunity to be heard:* The inmate/ward shall be given an opportunity to respond to any and all evidence and offer evidence on his behalf.

(a) He should be permitted to call witnesses and present evidence on his behalf so long as it will not be unduly hazardous to institutional safety or correctional goals.

(b) The Committee may deny the inmate's/ward's calling of certain witnesses or presentation of certain evidence for reasons such as: irrelevance; lack of necessity; the hazards presented in individual cases; or any other justifiable reason. In this regard, the Committee retains the discretion to keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate/ward to be heard. The Committee is encouraged, but is not required, to state the reason(s) for the refusal.

(5) *Counsel substitute:* No inmate/ward shall be represented by an attorney at the Program Committee hearing. He will be permitted to employ counsel-substitute which shall constitute a member of the facility staff who did not actively participate in the process by which the individual was brought before the Committee or, in the facility administrator's discretion, a sufficiently competent inmate designated by the facility staff.

d. *Findings.* The inmate/ward has a right to be apprised of the findings of the Program Committee.

(1) Upon completion of the hearing, the Committee may take the matter under advisement and will render a recommendation based only upon evidence presented at the hearing to which the individual had an opportunity to respond or any evidence which may subsequently come to light after the formal hearing. The inmate/ward's silence may be used as a permissible inference of evidence against him, although reprogramming must be based upon more than his mere silence.

(2) The inmate/ward shall be given a brief written summary of the Committee's findings within a reasonable period of time after the hearing, which findings shall be entered in his file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason(s) therefore must be set forth in the findings.

(3) The facility administrator will, within a reasonable period of time, review the Program Committee's recommendation. He may, as the final decisionmaker:

(a) Affirm or reverse, in whole or in part, the recommendation; or

(b) hold in abeyance any action he believes jeopardizes the safety, security, or welfare of the staff, inmate/ward, other inmates/wards, institution, or community and refer the matter back to the Program Committee for further study and recommendation.

4. *Review:*

Each inmate/ward has the right to seek administrative review of the decision through the grievance process. Review shall be initiated within fourteen calendar days of receipt of the final decision.

V

LEGAL COUNSEL

Notwithstanding the foregoing Supplementary Rules and Regulations, an inmate/ward may retain legal counsel only in the following specific situations:

1. Classification Process:

a. For a potential Interstate transfer.

b. For a potential transfer to an increased security classification longer than 30 days.

2. Adjustment Process:

a. For a potential segregated punishment longer than 30 days.

b. For any rule violation which also constitutes a criminal felony.

Appendix E

Peter Lono, Plaintiff-Appellant,

v.

George Ariyoshi, individually and in his capacity as Governor of Hawaii; Andrew Chang, individually and in his capacity as Director of Social Services & Housing, State of Hawaii; Michael Kakesako, individually and in his capacity as Administrator, Corrections Division, Department of Social Services & Housing; Antone Olim, individually and in his capacity as Administrator, Hawaii State Prison; and Edwin Shimoda, individually and in his capacity as Chairperson, Lono Program Committee, Defendants-Appellees.

No. 6729.

Supreme Court of Hawaii.

Jan. 2, 1981.

Before RICHARDSON, C. J., MENOR and OGATA, JJ., and Retired Justice MARUMOTO in place of KOBAYASHI, J., excused.*

MARUMOTO, Justice.

This is an appeal by plaintiff Peter Lono from the order of the First Circuit Court dismissing his complaint against

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*Justice Kidwell, who heard oral argument in this case, retired from the court on February 28, 1979. HRS § 602-10 (1979 Supp.) provides: "After oral argument of a case, if a vacancy arises or if for any other reason a justice is unable to continue on the case, the case may be decided or disposed of upon the concurrence of any three members of the court without filling the vacancy or the place of such justice."

the Governor of Hawaii, and other State officials concerned with the administration of Hawaii State Prison (HSP).

In the complaint, plaintiff sought temporary and permanent injunctive relief against his transfer from HSP to a mainland penal institution, and a declaratory judgment that his transfer would be in violation of the constitutions of the United States and the State of Hawaii, and the Supplementary Rules and Regulations of the Corrections Division (Rules) of the State Department of Social Services and Housing (DSSH).

Plaintiff was convicted of murder in the second degree in the First Circuit Court, and was sentenced to a maximum term of 90 years in HSP on November 19, 1970. Thereafter, the following events transpired within the HSP administration:

January, 1976: Plaintiff and five other HSP inmates were segregated from the general prison population on the basis of information from confidential sources that they were leaders of an inmate strike. For his participation in the strike, plaintiff was sentenced to one year in the maximum control unit. However, that sentence was suspended, and plaintiff remained in the general prison population.

Summer, 1976: State of Hawaii arranged with the Bureau of Prisons, United States Department of Justice (FBP), and the State of California, to transfer HSP inmates to mainland prisons during the construction of new prison facilities in Hawaii.

September 27, 1976: HSP administrator submitted a tentative list of eight inmates, including plaintiff, to FBP for its approval. However, no decision to transfer had been made at that time.

November 8, 1976: FBP informed HSP administrator that it would accept plaintiff at the Federal prison on McNeil Island, Washington.

February 11, 1977: HSP Program Committee (PPC) notified plaintiff to be present at the committee meeting on February 16, 1977, to be held for the following purpose:

> Reason for meeting: To determine whether your classification within the Corrections Division should be changed. The Committee will consider your entire file, your changing needs, resources and facilities available to the Corrections Division, and the security of the State facilities and personnel. The Committee will consider whether you should remain at HSP, or be transferred to a mainland state or federal institution.

February 22, 1977: PPC meeting, which was originally scheduled to be held on February 16 was postponed at the request of plaintiff's counsel and was held on this day. At the meeting, PPC chairman read a letter from HSP administrator to a State deputy attorney general regarding plaintiff's organization of the inmate work strike and his segregation from the general inmate population. The administrator declined to testify at the meeting because he was the reviewing officer of PPC findings. PPC also considered information from a confidential source regarding plaintiff's drug involvement and covert backyard predatory activities. At the conclusion of the meeting, PPC recommended that plaintiff be transferred to a mainland Federal prison, pursuant to its findings that (a) plaintiff posed a behavioral/management problem; (b) his maximum security classification restricted his participation in HSP programs; and (c) there were more programs available to him at a Federal prison.

March 3, 1977: HSP administrator sustained PPC recommendation.

On March 16, 1977, plaintiff filed his complaint in the circuit court. The circuit court, after denying the temporary injunctive relief sought by plaintiff, entered its order denying permanent injunction, and dismissing the complaint, on August 11, 1977.

In the meantime, plaintiff was transferred from HSP, first to the Federal prison on McNeil Island, and later to the Federal prison at Marion, Illinois.

On this appeal, plaintiff has presented the following four questions for decision by this court: first, whether the procedure followed by PPC at its meeting on February 22, 1977, violated his due process rights under the fourteenth amendment of the United States constitution; second, whether it violated his due process rights under Article I, Section 4, of the Hawaii constitution; third, whether it violated his procedural rights under the Rules; and, fourth, whether it violated his procedural rights under the Hawaii Administrative Procedure Act (HAPA).[1]

The first three questions are questions as to which plaintiff sought declaratory judgment in his complaint. The fourth question was not raised by plaintiff in his complaint, or any amendment thereto, but was brought up orally by plaintiff's counsel in his argument in the circuit court.

---

[1]Article I, Section 4, of the Hawaii constitution, referred to in this case, is incorporated in Article I, Section 5, of the Hawaii constitution, as amended and in force January 1, 1979.

A state prisoner's procedural rights under the United States constitution are outlined in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

The procedure set forth in *Wolff v. McDonnell* is triggered only when a state action involves an infringement of state prisoner's property or liberty interest. This point is not disputed by plaintiff.[2]

Under *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976), the only source of a state prisoner's protected interest is state law.

Plaintiff has not contended that he had any property interest which was subject to infringement by his transfer from HSP to a mainland Federal prison.

That narrows our inquiry to whether plaintiff had any liberty interest under Hawaii law which would have triggered the application of the procedural requirements of *Wolff v. McDonnell*.

Plaintiff asserts that HRS § 706-672, and Rule IV of the Rules, clothed him with the requisite liberty interest.

HRS § 706-672 provides that, when a person is sentenced to imprisonment for an indeterminate term, the court shall commit him to the custody of DSSH for the term of his sentence and until he is released in accordance with law; that the court shall determine the initial place of confine-

---

[2]It is stated in plaintiff's opening brief filed in this appeal:

> It has long been established that due process is required by the fourteenth amendment only when the state infringes a "liberty" or "property" interest.

ment; and that the director of DSSH shall determine the proper program of redirection and any subsequent place of confinement best suited to meet the individual needs of the committed person.

Rule IV of the Rules, which was in effect at the time plaintiff's hearing was held, dealt with the classification process, as distinguished from the adjustment process, and stated that it never inflicted any punishment but was concerned with a continuing evaluation of each individual inmate to ensure his optimum placement within the Corrections Division.

With regard to HRS § 706-672, plaintiff contends that it provides a prisoner "with the expectation that he will not be moved to another prison unless it is determined that the transfer is better suited to his needs."

Similarly, with respect to Rule IV of the Rules, it is contended that, under the rule, "the prisoner has a justifiable expectation rooted in Hawaii law, that he will not be transferred unless it is determined by an impartial committee that optimum placement lies within another institution."

In connection with plaintiff's contention based on HRS § 706-672, as well as his contention based on Rule IV of the Rules, *Meachum v. Fano, supra,* and *Montanye v. Haymes,* 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976) are pertinent.

Meachum v. Fano presented to the United States Supreme Court two questions for decision on a petition for a writ of certiorari from a judgment of the United States Court of Appeals for the First Circuit.

The first question was whether the United States constitution required Massachusetts correctional officials to conduct fact finding hearings in connection with transfers of duly convicted state prisoners from a medium security correctional facility at Norfolk to maximum security correctional facilities at Walpole and Bridgewater, where the living conditions were substantially less favorable to them than at Norfolk, in the absence of a state law or practice which conditioned such transfers on proof of serious misconduct or occurrence of other specified events. The second question was whether the hearings granted in the case were adequate.

The court answered the first question in the negative. In the light of its answer to the first question, the court did not reach the second question.

In answering the first question in the negative, the court rejected at the outset the notion that any grievous loss visited upon a person by a state is sufficient to invoke the procedural protections of the due process clause of the constitution, held that the determining factor is the nature of the interest involved, and made the following statements which are equally applicable to the case at hand:

> The initial inquiry is whether the transfer of respondents from Norfolk to Walpole and Bridgewater infringed or implicated a "liberty" interest of respondents within the meaning of the Due Process Clause. Contrary to the Court of Appeals, we hold that it did not.
>
> • • •
>
> [G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the ex-

> tent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.
>
> • • •
>
> Transfers between institutions * * * are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate.
>
> • • •
>
> Here, Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct. Insofar as we are advised, transfers between Massachusetts prisons are not conditioned upon the occurrence of specified events.
>
> • • •
>
> Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him to whatever reason or for no reason at all.

Montanye v. Haymes was decided by the United States Supreme Court on the same day as *Meachum v. Fano* on a petition for a writ of certiorari from the judgment of the United States Court of Appeals of the Second Circuit.

The case involved the removal of respondent, a New York state prisoner, as inmate clerk in the law library at Attica Correctional Facility, and his transfer, without a hearing,

to Clinton Correctional Facility. Both facilities are maximum security institutions. Respondent's transfer was made for preparing, and circulating among other inmates, a document regarding prison administration in direct disregard of applicable prison rule. The transfer did not involve loss of good time, segregated confinement, loss of privilege, or other disciplinary measures.

Under the New York law, as described in the court's opinion in the case:

> (a) adult persons sentenced to imprisonment are not sentenced to particular institutions, but are committed to the custody of the Commissioner of Corrections;
>
> (b) the Commissioner receives adult male felons at a maximum security reception center for initial evaluation and transfer to specified institutions;
>
> (c) the Commissioner may thereafter transfer the inmates from one correction facility to another;
>
> (d) transfers of inmates are not conditioned upon or limited to the occurrence of specific misconduct;
>
> (e) no conditions are imposed on the Commissioner's discretionary power to transfer;
>
> (f) transfers are not among the punishments which may be imposed only after a prison disciplinary hearing.

Upon reviewing the New York law, the court held that respondent had no right to remain at any particular prison facility and no justifiable expectation that he would not

be transferred unless he was found guilty of misconduct, and stated:

> Whatever part an inmate's behavior may play in a decision to transfer, there is no more basis in New York law for invoking the protections of the Due Process Clause than we found to be the case under the Massachusetts law in the Meachum case.

The provisions of Hawaii law relating to placement and transfers of persons sentenced to imprisonment are substantially the same as the New York law described in *Montanye v. Haymes*, except that, in HRS § 706-672, the words "place of confinement best suited to meet the individual needs of the committed persons" are used in referring to place of confinement upon transfer, and, in Rule IV of the Rules, the words "optimum placement within the Corrections Division" are used in connection with place of confinement upon classification.

In our opinion, the quoted words do not limit the authority of the director of DSSH in selecting a place of confinement upon a decision to transfer or upon classification.

The following language in *Lombardo v. Meachum*, 548 F.2d 13 (1st Cir. 1977), is applicable in construing those words:

> The regulations plaintiff relies upon * * simply provide that an inmate will receive a certain type of a hearing before he is reclassified. The regulations contain no standards governing the Commissioner's exercise of his discretion, and they, therefore, cannot

> create the kind of substantive interest which is required before a state created "liberty" interest can be said to exist.

Similarly, the language in HRS § 706-672 and the language in Rule IV of the Rules, upon which plaintiff relies, contain no standards governing the determination by the director of DSSH of a place of confinement best suited to meet the individual needs of the committed person and optimum placement of the committed person within the Corrections Division, thereby leaving the determination of those matters entirely to the discretion of the director.

Thus, HRS § 706-672 and Rule IV of the Rules did not clothe plaintiff with the requisite liberty interest which would have triggered the application of the procedural requirements under the fourteenth amendment of the United States constitution.

On the question regarding violation of his due process rights under the Hawaii constitution, plaintiff cites *Silver v. Castle Memorial Hospital*, 53 Haw. 475, 497 P.2d 564 (1972), and *Aguiar v. Hawaii Housing Authority*, 55 Haw. 478, 522 P.2d 1255 (1974), and argues that, under Hawaii law, substantiality of interest, rather than its source, gives rise to protected interest.

Silver v. Castle Memorial Hospital and *Aguiar v. Hawaii Housing Authority* are not apposite. Both cases involved property interest, and the determining factor was the fact that the plaintiffs in those cases had property interest in the matters in controversy.

We hold that under the Hawaii constitution, the determining factor is the nature of the interest involved, rather than its weight, as the United States Supreme Court held in *Meachum v. Fano, supra,* with respect to procedural protections under the due process clause of the United States constitution.

With respect to plaintiff's contentions based on claim of violation of his procedural rights under the Rules, we find the same to be without merit, upon a careful examination of the points raised in plaintiff's brief and the relevant provisions of the Rules.

Our answer to the question posed by plaintiff as to whether the procedure followed by PPC at his classification hearing violated his procedural rights under HAPA depends on whether the hearing involved a contested case under HAPA.

HRS § 91-1(5) defines contested case as a proceeding in which legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

The question posed by plaintiff is answered by *Tai v. Chang,* 58 Haw. 386, 570 P.2d 563 (1977).

In that case, petitioner sought a writ of habeas corpus and injunctive relief in connection with his transfer from HSP to the United States Penitentiary in Atlanta, Georgia, and alleged, as one of the grounds for relief, that he was not accorded a hearing before his transfer.

This court denied the requested relief on the ground that his transfer did not involve a contested case and the HAPA hearing requirement did not apply, stating as its reason for the denial:

> Since the phrase *required* by *law* embraces both constitutional as well as statutory law * * *, ordinarily both would be examined to see if appellant was entitled to a hearing before his transfer. No constitutional issues, however, are before this court as none were raised below. Looking solely to statutory law, a review of such laws in effect at the time of appellant's transfer in 1966 yields nothing which entitled him to a hearing.

We have shown earlier in this opinion that there is nothing in the United States constitution, the Hawaii constitution, or the Hawaii statutory law, which entitles plaintiff to a hearing.

Affirmed.

Office - Supreme Co... U.S.
FILED
SEP 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, WINTON LEONG, AND EDWIN SHIMODA, *Petitioners*,

v.

DELBERT KAAHUNUI WAKINEKONA, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed February 22, 1982, Certiorari Granted June 1, 1982.

TABLE OF CONTENTS

	Page
Chronological List Of Relevant Docket Entries	i
Plaintiff's First Amended Complaint Filed October 6, 1976	1
Judgment, Filed June 8, 1978, U.S. District Court, District Of Hawaii	30
Judgment, Filed May 26, 1981, U.S. Court Of Appeals For The Ninth Circuit	31

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*The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the U.S. Court of Appeals for the Ninth Circuit, dated May 26, 1981 ..... A-1

Order and Amendment of Opinion of the U.S. Court of Appeals for the Ninth Circuit, dated November 27, 1981 ..... B-1

Memorandum and Order of the U.S. District Court, District of Hawaii, dated June 8, 1978 ..... C-1

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

August 9, 1976	Complaint filed.
August 24, 1976	Answer filed.
October 6, 1976	First Amended Complaint filed.
October 26, 1976	Answer to First Amended Complaint filed.
June 8, 1978	Memorandum and Order—Plaintiff's First Amended Complaint Dismissed.
	Judgment on Decision by the Court.
June 30, 1978	Notice of Appeal filed.
May 26, 1981	Opinion of the U.S. Court of Appeals for the Ninth Circuit
July 8, 1981	Motion for Reconsideration and Suggestion for Rehearing *En Banc* or, Alternatively for a Stay Pending Certiorari
November 27, 1981	Order and Amended Opinion of the U.S. Court of Appeals for the Ninth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 76-0286

DELBERT KAAHANUI WAKINEKONA,

Plaintiff,

v.

NELSON K. DOI, ANDREW I.T. CHANG, ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, LINTON LEON, and EDWIN SHIMODA,

Defendants.

FILED IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
October 6, 1976

at 2 o'clock and 8 min. p.m.
WALTER A.Y.H. CHINN, CLERK
by Leslie L. Tau'a (Deputy)

FIRST AMENDED COMPLAINT

EXHIBITS "A," "B," "C" AND "D"

DEMAND FOR JURY TRIAL

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CERTIFICATE OF SERVICE ATTACHED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 76-0286

DELBERT KAAHANUI WAKINEKONA,
Plaintiff,

v.

NELSON K. DOI, ANDREW I.T. CHANG, ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, LINTON LEON, and EDWIN SHIMODA,
Defendants.

FIRST AMENDED COMPLAINT

I.

INTRODUCTION

1. This is an action brought by the Plaintiff above-named against certain State officials and employees, who did cause and/or conduct a hearing to be held whereby the Plaintiff was transferred from the Hawaii State Prison to a California penal institution known as Folsom State Prison. The action complained of herein is that the named defendants, under color of State law, did willfully, maliciously and recklessly cause and/or conduct the aforesaid hearing in such a manner so as to deny the Plaintiff his constitutional rights as provided in the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and did further violate certain Hawaii State laws, state regulations and Article I, Section 4 and 9 of the Hawaii State Constitution.

II.

JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331, 28 U.S. § 1343[3]. Plaintiff's right of action is based on 42 U.S.C. § 1983.

III.

PARTIES

3. Defendant NELSON K. DOI is an elected Lieutenant Governor of the State of Hawaii, by delegation of authority of the Governor of the State of Hawaii is generally supervising the management of Hawaii State Prison, and is an announced candidate for the office of Mayor of the City and County of Honolulu, State of Hawaii.

4. Defendant ANDREW I.T. CHANG is the appointed director of the Department of Social Services and Housing, State of Hawaii, and is responsible by statute for the supervision of the Hawaii State Prison.

5. Defendant ANTONE OLIM is the administrator of the Hawaii State Prison.

6. Defendants EDITH M. WILHELM, JOHN SMYTHE, LINTON LEON, and EDWIN SHIMODA are all employees of the Hawaii State Department of Social Services and Housing and did directly commit the actions complained of herein.

7. That the action complained of herein which were committed by the defendants WILHELM, SMYTHE, LEON, and SHIMODA were committed pursuant to the authority granted to said defendants by defendants, DOI, CHANG and OLIM and which were ratified by the defendants DOI, CHANG and OLIM and hence are their responsibility under the doctrine of Respondeat Superior.

IV.

FACTUAL ALLEGATIONS

8. That at all times mentioned herein, the Plaintiff was in the custody of the Corrections Division of the Hawaii State Department of Social Services and Housing being an inmate of the Hawaii State Prison confined to the maximum control unit therein.

9. That on August 2, 1976, the Plaintiff DELBERT KAAHANUI WAKINEKONA appeared before a board designated as a Program Committee of the Hawaii State Prison which included the defendants WILHELM, SMYTHE, LEON and SHIMODA for a hearing whose stated purpose was that of determining the reason for which the programs at the maximum control unit of the Hawaii State Prison had failed.

10. That on August 5, 1976, the Plaintiff was served with the written notice that he would have a further hearing to determine his program designation at Hawaii State Prison, which included a possible transfer to an out-of-state penal facility and that on said date Plaintiff was transferred to the correctional facility known as Halawa Correctional Facility.

11. That on August 10, 1976, a hearing was held on Plaintiff's program classification at Hawaii State Prison; that on August 11, 1976, the committee which consisted of the defendants WILHELM, SMYTHE, LEON and SHIMODA and which conducted the aforesaid hearing rendered its decision and a written copy thereof was served on Plaintiff on August 12, 1976.

12. That the decision of the aforementioned committee was that the Plaintiff should be transferred to a mainland facility. (See Exhibit "A," a xeroxed copy of said decision.)

13. That on August 13, 1976, the Plaintiff was transferred to the California correctional facility known as Folsom State Prison.

V.

FIRST CLAIM FOR RELIEF

14. That the decision of the defendants WILHELM, SMYTHE, LEON and SHIMODA was a malicious and willful violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I Section 4 of the Hawaii State Constitution in that it was rendered by a board the composition of which was biased and

prejudicial against the Plaintiff and consisted of persons who were directly responsible for the initiation of said hearing which rendered the decision and whose specific intent and purpose was that of effectuating said transfer.

VI.

SECOND CLAIM FOR RELIEF

15. That the hearings on August 2, 1976 and August 10, 1976 were governed by state regulations promulgated and issued by the Corrections Division, Hawaii State Department of Social Services and Housing (see Exhibit "B," a xerox copy of said regulations attached hereto and incorporated herein).

16. That the transfer of the Plaintiff to the California State penal facility known as Folsom State Prison and the subsequent confinement of the Plaintiff in the "hole" at said facility was inconsistent hearing of August 10, 1976 as set forth in the aforesaid state regulations in that it was clearly punitive in design, purpose and intent, as is more fully shown by Exhibit "C" and "D," which are xerox copies of correspondence to Plaintiff's undersigned counsel and an attachment thereto.

VII.

THIRD CLAIM FOR RELIEF

17. That the actions taken by the defendants were a malicious and willful violation of state law, namely Chapter 353, Hawaii Revised Statutes.

WHEREFORE, the Appellant prays that this Honorable Court grant the following relief:

1. That a judgment issue declaring the actions complained of herein violate the Fifth, Eighth and Fourteenth Amendments of the United States Constitution, Article I, Section 4 and 9 of the Hawaii State Constitution, Chapter 353, Hawaii Revised Statutes and applicable state regulations.

2. That general damages be granted the Plaintiff against each of the named defendants, individually, in the sum of TEN THOUSAND DOLLARS ($10,000.00);

3. That punitive damages be granted the Plaintiff against each of the named defendants, individually, in the sum of TEN THOUSAND DOLLARS ($10,000.00);

4. Such further and other relief as this Court deems proper and appropriate.

DATED: Honolulu, Hawaii, September 16, 1976.

/s/ Clayton C. Ikei
CLAYTON C. IKEI
Attorney for Plaintiff

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
Corrections Division

WAKINEKONA, Delbert K. — Name
576-42-7068 — Number

NOTICE OF PROGRAMMING

August 5, 1976 — Date
_____ — Time

You are herein informed that your correctional program is scheduled to be reviewed, evaluated, or established by the program committee/diagnostic team and you are to be present at HCF, 9:00 a.m. on the 10th of August 1976.

Reason for meeting:

To determine whether your classification within the Corrections Division should be changed. The Committee will consider your entire file, your changing needs, resources and facilities available to the Corrections Division, security of State facilities and personnel, and needs of the Other inmates. The Committee will consider whether you should remain at HSP, be transferred to another Hawaii facility or be transferred to a mainland state or Federal institution.

/s/ Edith M. Wilhelm
EDITH M. WILHELM
Administrator

Receipt of notice: Date: _____ Signature: _____
(Resident)

Received notice of hearing on 8/5/76 at 1:57 p.m. J. Smythe

Results of meeting: (Summary) The Program Committee, having reviewed your entire file, your testimony and arguments by your counsel, concluded that your control classification remains at Maximum. You are still considered a security risk in view of your escapes and subsequent convictions for serious

felonies. The Committee noted the progress you made in vocational training and your expressed desire to continue in this endeavor. However your relationship with staff, who reported that you threaten and intimidate them, raises grave concerns regarding your potential for further disruptive and violent behavior. Since there is no other Maximum security prison in Hawaii which can offer you the correctional programs you require and you cannot remain at MCU because of impending construction of a new facility, the Program Committee recommends your transfer to an institution on the mainland.

/s/ Edith M. Wilhelm 8/11/76
EDITH M. WILHELM
Program Commiittee Chairman

Receipt of results: Date: _____ Signature _____
(Resident)

Program Committee's recommendation is sustained.

/s/ Antone Olim
ANTONE OLIM
August 11, 1976

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
STATE OF HAWAII

SUPPLEMENTARY RULES AND REGULATIONS
OF THE CORRECTIONS DIVISION

I

PROLOGUE

The following supplementary rules and regulations shall govern inmate/ward correspondence and the adjustment and classification processes within the Corrections Division of the State of Hawaii Department of Social Services and Housing. All prior Rules and Regulations governing the identical subject matters are null and void to the extent that they are inconsistent with these regulations.

II

CORRESPONDENCE

1. *INTRODUCTION:*

   Inmates/wards shall be afforded the privilege to send and receive letters to and from correspondents approved by the facility administrator.

2. *PRIVILEGED MAIL:*

   Privileged mail is that which is sealed and marked on the envelope as "confidential" and which may be inspected only for contraband in the presence of the inmate/ward. Letters to the Ombudsman may not be opened, but may be felt for contraband.

   a. Each inmate/ward may correspond via privileged mail with the following:

      1) the inmate/ward's sentencing judge;

      2) the inmate/ward's previously identified personal attorney;

      3) the Hawaii State Ombudsman;

4) the Governor of the State of Hawaii;

5) the Attorney General (State or Federal);

6) the Director, Department of Social Services and Housing;

7) the Corrections division Administrator;

8) the State of Hawaii Board of Paroles and Pardons;

9) the Facility Administrator; and

10) elected State of Hawaii officials.

b. Those inmate/wards committed under jurisdictions other than the State of Hawaii may, in addition, correspond, via privileged mail, with the following:

1) Chief executive of the foreign jurisdiction; and

2) Director of the department in foreign jurisdiction to which committed.

3. *INSPECTION:*

Incoming or outgoing mail to and from inmates/wards may be inspected and/or read pursuant to the following guidelines.

a. *Contraband.*

A facility administrator or a designated representative may inspect all incoming and outgoing mail to and from inmates/wards for the presence of contraband contained therein.

b. *Reading.*

The facility administrator or his designated representative may reject the mailing or receipt of letters pursuant to the following guidelines.

1) *Outgoing letters.* Outgoing letters from inmates/wards may be disapproved for mailing if the letter

is to a person who is not an approved correspondent or, upon reading, the letter concerns or contains any of the following:

(a) threats of physical harm against any person or threats of criminal activity;

(b) threats of blackmail or extortion;

(c) plans to send contraband in or out of the facility;

(d) plans to escape;

(e) plans for activities in violation of institutional rules;

(f) plans for criminal activity;

(g) is in code and its contents are not understood by the reader;

(h) solicits gifts of goods or money except as authorized.

(i) information which, if communicated, would create a clear and present danger of violence and/or physical harm to a human being;

(j) material which violates postal regulations; and/or

(k) conducting an inmate's/ward's business through the mails except as authorized.

2) 2) *Incoming letters.* Incoming letters to inmates/wards may be disapproved for receipt only: for the reasons set forth in 3b(1) above; if the letter contains material which would cause psychiatric or emotional disturbance to the inmate/ward; or if the letter is from a person who is not an approved correspondent and special permission for the letter has not been obtained.

3) *Limitations.* Disapproval of a letter on the basis that it would cause psychiatric or emotional disturbance to the inmate/ward may be done only by the facility administrator in consultation with a member of the facility's mental health or counseling staff. The letter may be disapproved only upon a finding that receipt of the letter would be likely to affect a prison discipline or security or the inmate's/ward's rehabilitation, and that there is no reasonable alternative means of ameliorating the disturbance to the inmate/ward. Outgoing or incoming letters may not be rejected solely upon the ground that they contain criticism of the institution or its personnel.

4) *Notice of Disapproval of Inmate Mail.*

(a) When an inmate/ward is probibited from sending a letter, the letter and a written and signed notice stating the reason(s) for disapproval and indicating the portions of the letter causing disapproval shall be given the inmate/ward.

(b) When an inmate/ward is prohibited from receiving a letter, the letter and a written and signed notice stating the reason(s) for disapproval and indicating the portion or portions of the letter causing disapproval will be given the sender. The inmate will be given notice in writing that a letter has been rejected, indicating the reason(s) and the sender's name.

(b) Copies of material from an inmate's/ward's correspondence which reveals evidence of past rule violations or contains any of the information set forth above in paragraph 3b(1) above may be placed in his file. He shall be notified in writing of the placing of any such material in his file.

5) *Use of English Language.* All letters should be written in English, but every effort should be made to accommodate those inmates/wards who are unable to write in English or whose correspondence would be unable to understand a letter written in English. The criminal sophistication of the inmate/ward and the relationship of the inmate/ward and the correspondent are factors to be considered in deciding whether correspondence in a foreign language should be permitted.

c. *Censorship.*

A facility administrator or a designated respresentative may censor incoming or outgoing mail to or from inmates/wards, subject to the following two criteria. First, censorship must further a substantial governmental interest, such as maintaining the security and order of the facility, rehabilitating the inmate/ward, or ensuring safety of facility personnel, residents, and/or the general community. Second, the facility will censor no more of the letter than necessary or essential to achieve the particular governmental interest. Thus, for example, plans for criminal activities, escape, movement of contraband, and the like may be censored, but not other unobjectionable material unrelated to the particular governmental interest. Copies of the censored material shall be placed in the inmate's/ward's file. He shall be notified in writing of the placing of any such material in his file.

III

THE ADJUSTMENT PROCESS

1. *GENERAL:*

The Adjustment process tailors punishment for specific rule violations to the individual's training and treatment needs while maintaining facility order and ensuring respect for rules and the rights of others.

a. *Minor Misconduct.* A minor rule violation is defined as that which poses no threat to the safety, security, or welfare of the staff, other inmates/wards, or the institution and/or subjects the individual to the imposition of lesser penalties, such as a reprimand or the mere loss of privileges. Such misconduct may be punished by a disciplinary hearing officer designated by the facility administrator who was not actively involved in the process by which the inmate/ward was brought before him. The disciplinary hearing officer shall inform the inmate/ward that he committed a minor infraction, to which the individual must be given a brief opportunity to respond, to offer an explanation or defense on his behalf, or otherwise show that he is not deserving of disciplinary action. The disciplinary hearing officer shall thereafter prepare a brief written report to be given to the individual and placed in his file, indicating the infraction, the sanction, and the date(s) the sanction is to be or was carried out.

b. *Serious Misconduct.* A serious rule violation is defined as that which poses a threat to the safety, security, or welfare of the staff, other inmates/wards, or the institution and/or subjects the individual to the imposition of serious penalties, such as segregation. Such misconduct will be punished through the Adjustment Committee pursuant to the procedures set forth below.

2. *COMPOSITION:*

The facility administrator shall establish an impartial Adjustment Committee composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee. The facility administrator shall not sit as a member of the Committee. The Adjustment Committee has the power to punish for misconduct.

3. *PROCEDURE:*

a. *Pre-hearing detention.* An inmate/ward should not be detained pending an Adjustment Committee hearing longer than three working days; provided, however, if, in the judgment of the facility administrator, conditions exist which require longer detention, he may be so detained for a reasonable time. The guidelines set forth for emergency detention should be followed.

b. *Pre-hearing investigation.* A staff member should conduct a complete investigation into the facts of the alleged misconduct to determine if there is probable cause to believe the inmate/ward committed misconduct. If he determines probable cause exists, the following procedures shall be initiated.

c. *Notice.* The inmate/ward has the right to prior notice that an Adjustment Committee hearing will be held against him.

(1) Within a reasonable time, not less than 24 hours prior to the hearing, the charged inmate/ward shall be served with written notice of the time and place of the Adjustment Committee hearing and what the specific charges, including a brief statement of the facts, are against him. If the inmate/ward waives the 24 hour period, it shall be reduced to writing and signed by the inmate/ward on the face of the notice.

(2) The inmate/ward and/or his counsel substitute (as described below) shall have the opportunity to review all relevant non-confidential reports of misconduct or a summary of the details thereof during the period between the notice and the hearing.

(3) The misconduct report or summary should briefly contain the following: the specific rule violated; the facts supporting the charge; any unusual

inmate/ward behavior; any staff or inmate/ward witnesses; the disposition of any physical evidence (e.g., weapons); and any immediate action taken.

d. *Hearing.* The inmate/ward has a right to appear at the Adjustment Committee hearing, except where institutional safety would be jeopardized. Exclusion of the individual from the hearing shall occur only in exceptional circumstances and shall be well documented. If the inmate/ward declines to attend the hearing, it shall be held regardless of his absence.

(1) The Committee shall explain the reason for the hearing and the nature of the charge(s) against the inmate/ward. The inmate/ward shall plead guilty or not guilty to the charges. Failure to plead shall be accepted as a plea of not guilty.

(a) A plea of guilty eliminates the need to present evidence against the inmate/ward who will then be given an opportunity to explain his actions and/or offer evidence in mitigation.

(b) A plea of not guilty necessitates the presentation of evidence against the inmate/ward.

(2) Evidence, such as testimony and reports, shall be presented to the Committee in the presence of the charged inmate/ward. The inmate/ward should be advised that he has a right to remain silent, but that his silence may be used as a permissable inference of guilt.

(3) *Confrontation and cross-examination:*

(a) The inmate/ward may be given the privilege to confront and cross-examine adverse witnesses.

(b) However, the Committee may deny confrontation and cross-examination and identification of adverse witnesses if in its adjustment to do so would:

(i) subject the witnesses to potential reprisal;

(ii) jeopardize the security and/or good government of the facility; or

(iii) be otherwise unduly hazardous to the facility's safety or correctional goals.

(c) If confrontation and cross-examination and identification of adverse witnesses are denied, the Committee may, but is not required to, enter in the record of the proceeding and make available to the inmate/ward an explanation for the denial. Additionally, the inmate/ward shall be given an oral or written summary of the testimony against him and provided an opportunity to respond.

(4) *Opportunity to be heard:* The inmate/ward shall be given an opportunity to respond to any and all evidence against him, explain his alleged misconduct, and/or offer evidence of mitigation.

(a) He should be permitted to call witnesses and present evidence in his defense so long as it will not be unduly hazardous to institutional safety or correctional goals.

(b) The Committee may deny the inmate's/ward's calling of certain witnesses or presentation of certain evidence for reasons such as: irrelevance; lack of necessity; the hazards presented in individual cases; or any other justifiable reason. In this regard,

the Committee retains the the discretion to keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate/ward to be heard. The Committee is encouraged, but is not required, to state the reason(s) for the refusal.

(5) *Counsel substitute:* No inmate/ward shall be represented by an attorney at the Adjustment Committee hearing. He will be permitted to employ counsel-substitute. Counsel-substitute shall constitute a member of the facility staff who did not actively participate in the process by which the individual was brought before the Committee or, in the facility administrator's discretion, a sufficiently competent inmate designated by the facility staff.

e. *Findings.* The inmate/ward has a right to be apprised of the findings of the Adjustment Committee.

(1) Upon completion of the hearing, the Committee may take the matter under advisement and will render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond to any evidence which may be subsequently come to light after the formal hearing. The inmate/ward's silence may be used as a permissable inference of guilt, although disciplinary action must be based upon more than his mere silence. Disciplinary action may only be rendered where:

(a) the inmate/ward admits the violation or pleads guilty;

(b) the charge is supported by substantial evidence; and/or

(c) there is reasonable cause to believe that the inmate's/ward's behavior has constituted a danger to person, property, security, or the orderly operation of the facility.

(2) The inmate/ward shall be given a brief summary of the Committee's findings within a reasonable period of time after the hearing, which findings shall be entered in his file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason(s) therefore must be set forth in the findings.

f. *Punishment.* The Adjustment Committee has the power to render sanctions commensurate with the gravity of the rule and the severity of the violation. Corporal punishment is prohibited provided, however, that physical force may be employed for self-defense or defense of others, to maintain the immediate order and security of the prison, to remove an inmate pursuant to a lawful order, or any other reason demanded by the exigencies of institutional safety and correctional goals. The following types of punishment may be rendered by the Adjustment Committee:

(1) temporary or permanent loss of privileges;

(2) segregation or confinement not longer than 60 days provided, however, that a longer period may be imposed with the express written approval of the Corrections Division Administration; and

(3) any other punishment deemed necessary by the Adjustment Committee.

The Committee may also refer the matter to the Prison Program Committee for further action.

4. *REVIEW:*

Each inmate/ward has the right to seek administrative review of the decision of the disciplinary hearing officer or adjustment committee through the grievance process. Review shall be initiated within fourteen calendar days of receipt of the Committee's decision.

IV

THE CLASSIFICATION PROCESS

1. *GENERAL:*

An inmate's/ward's classification determines where he is best situated within the Corrections Division. Rather than being concerned with isolated aspects of the individual or punishment (as is the adjustment process), classification is a dynamic process which considers the individual, his history, his changing needs, the resources and facilities available to the Corrections Division, the other inmates/wards, the exigencies of the community, and any other relevant factors. It never inflicts punishment; on the contrary, even the imposition of a stricter classification is intended to be in the best interests of the individual, the State, and the community. In short, classification is a continuing evaluation of each individual to ensure that he is given the optimum placement within the Corrections Division.

2. *COMPOSITION:*

The facility administrator shall establish an impartial Program Committee composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee. The facility administrator shall not sit as a member of the Committee.

3. *PROCEDURE:*

So long as a transfer involves a grevious loss to the inmate/ward, the following procedures adhere. Grievous loss is generally defined as a serious loss to a reasonable man. Thus, transfer from Hawaii State Prison to Kulani Honor Camp would normally not cause a grievous loss.

a. *Pre-hearing detention.* An inmate/ward should not be detained pending hearing longer than four working days, except where emergency conditions require a longer period of detention which shall be a reasonable time.

b. *Notice.* The inmate/ward has the right to prior notice that a Program Committee hearing will be held involving him.

(1) Within a reasonable time, not less than 24 hours prior to the hearing, the inmate/ward shall be served with written notice of the time and place of the Program Committee hearing and what the Committee will consider at the hearing. The notice should briefly state what the classification process involves, that it considers everything in his file, and any recent specific facts which may weigh significantly in the classification process. If the inmate/ward waives the 24 hour period, it shall be reduced to writing and signed by the inmate/ward on the face of the notice.

(2) The inmate/ward and/or his counsel substitute (as described below) shall have the opportunity to review all relevant nonconfidential information, that may be considered by the Committee, during the period between the notice and the hearing.

c. *Hearing.* The inmate/ward has a right to appear during the Program Committee hearing if a change, modification, or transfer is planned which would result

in a grievous loss. If the inmate/ward declines to attend the hearing, it shall be held regardless of his absence.

(1) The Committee shall explain the nature of the classification process and generally what the Committee is considering at the hearing.

(2) Evidence shall be presented to the Committee in the presence of the inmate/ward. The inmate/ward should be advised that he has a right to remain silent, but that his silence may be used as a permissible inference of evidence against him.

(3) *Confrontation and cross-examination*:

(a) The inmate/ward may be given the privilege to confront and cross-examine adverse witnesses.

(b) However, the Committee may deny confrontation and cross-examination and identification of adverse witnesses if in its judgment to do so would:

(i) subject the witness(es) to potential reprisal;

(ii) jeopardize the security and/or good government of the facility; or

(iii) be otherwise unduly hazardous to the facility's safety or correctional goals.

(c) If confrontation and cross-examination and identification of adverse witnesses are denied, the Committee may, but is not required to, enter in the record of the proceeding and make available to the inmate/ward an explanation for the denial. Additionally, the inmate/ward shall be given an oral or written summary of the testimony against him and provided an opportunity to respond.

(4) *Opportunity to be heard*: The inmate/ward shall be given an opportunity to respond to any and all evidence and offer evidence on his behalf.

(a) He should be permitted to call witnesses and present evidence on his behalf so long as it will not be unduly hazardous to institutional safety or correctional goals.

(b) The Committee may deny the inmate's/ward's calling of certain witnesses or presentation of certain evidence for reasons such as: irrelevance; lack of necessity; the hazards presented in individual cases; or any other justifiable reason. In this regard, the Committee retains the discretion to keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate/ward to be heard. The Committee is encouraged, but is not required, to state the reason(s) for the refusal.

(5) *Counsel substitute*: No inmate/ward shall be represented by an attorney at the Program Committee hearing. He will be permitted to employ counsel-substitute which shall constitute a member of the facility staff who did not actively participate in the process by which the individual was brought before the Committee or, in the facility administrator's discretion, a sufficiently competent inmate designated by the facility staff.

d. *Findings*. The inmate/ward has a right to be apprised of the findings of the Program Committee.

(1) Upon completion of the hearing, the Committee may take the matter under advisement and will render a recommendation based only upon evidence presented at the hearing to which the indi-

vidual had an opportunity to respond or any evidence which may subsequently come to light after the formal hearing. The inmate/ward's silence may be used as a permissible inference of evidence against him, although reprogramming must be based upon more than his mere silence.

(2) The inmate/ward shall be given a brief written summary of the Committee's findings within a reasonable period of time after the hearing, which findings shall be entered in his file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason(s) therefore must be set forth in the findings.

(3) The facility administrator will, within a reasonable period of time, review the Program Committee's recommendation. He may, as the final decisionmaker:

(a) Affirm or reverse, in whole or part, the recommendation; or

(b) hold in abeyance any action he believes jeopardizes the safety, security, or welfare of the staff, inmate/ward, other inmates/wards, institution, or community and refer the matter back to the Program Committee for further study and recommendation.

4. *REVIEW:*

Each inmate/ward has the right to seek administrative review of the decision through the grievance process. Review shall be initiated within fourteen calendar days of receipt of the final decision.

V

LEGAL COUNSEL

Notwithstanding the foregoing Supplementary Rules and Regulations, an inmate/ward may retain legal counsel only in the following specific situations:

1. Classification Process:
   a. For a potential Interstate transfer.
   b. For a potential transfer to an increased security classification longer than 30 days.
2. Adjustment Process:
   a. For a potential segregated punishment longer than 30 days.
   b. For any rule violation which also constitutes a criminal felony.

Effective date: These supplementary rules and regulations shall become effective ten days after filing in the Office of the Lieutenant Governor of the State of Hawaii.

Adopted:

/s/ Andrew I.T. Chang
ANDREW I.T. CHANG
Director, Department of Social Services and Housing.

APPROVED AS TO FORM:

/s/ Michael A. Lilly
MICHAEL A. LILLY
Deputy Attorney General

Date: June 10, 1976

APPROVED:

/s/ George R. Ariyoshi
GEORGE R. ARIYOSHI
Governor, State of Hawaii

Date: June 15, 1976

EXHIBIT C

Name: D. Wakinekona B-75902X
Box No.: Reprisa, California
Date: August 16, 19__

Gil & Clayton

This is just a short note to let you, both know I'm at Folsom Prison, and right at this moment I'm in th hole!!! I just got through facing a committee a few minutes ago to see if I should go to the main yard, but there decision (wrong) was that I should remain in the hole just as I was back there in Hawaii, except in here we take a bath on Wensdays and Sunday, what system this place has, so far no programs and Hawaii say's that I'll have so

All it seems to me that I was taken out of one hole or unit and put into another one!! a bigger one though.

I hope something can be done so cause I miss Haw and my family!!

In this letter is a peice of paper which I was given on the night I arrived, it seems Hawaii made me out to be a bad guy. Maybe I'm wrong. ren isn't here with me he must be at San Quenten

Delbert

P.S.
When writing to me use may name and new number as you see it on the envelope or else I won't get the mail.

P.S.S. Send me stamps

EXHIBIT D

NAME and NUMBER WAKINEKONA B-75902X CELL: SHU 23

above named inmate arrived this date from Hawaii prison system. Placed in the Security Housing unit pursuant to memo from J. Osmpoy, AWC, which reads as follows: "On Friday August 13th at approximately 8:00 pm inmate Kakinelsona will arrive at Folsom vin CDC transportation./This inmate is from the Hawaii prison system and will be on safekeeper status at Folsom. He has been convicted of murder 1st and is serving a sentence of life without possibiliyt of parole and, for two counts of armed robbery. This inmate is on lockup status in the Hawaii prison system. He has a background of aggravated battery and has a history of escape from prison. He is considered to be the most dangerous and assaultive inmate in the Hawaii prison system. He is to be kept separated from inmate Kashanni, who should arrive tomorrow, also from the Hawaii system, as much as possible. . . ."

IG: Central File via H. Morphis, AWC/t
CO Mr. Petrocci
AWC File
Inmate/Undersigned
August 13, 1976

/s/ F. J. Gaul, Lieutenant
F. J. GAUL
3rd Watch

CLASS. and SOC. SERV.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 76-0286

DELBERT KAAHANUI WAKINEKONA,

Plaintiff,

v.

NELSON K. DOI, ANDREW I.T. CHANG, ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, LINTON LEON, and EDWIN SHIMODA,

Defendants.

DEMAND FOR JURY TRIAL

The Plaintiff hereby demands a trial by jury on all issues so triable herein.

DATED: Honolulu, Hawaii, September 16, 1976.

/s/ Clayton C. Ikei
CLAYTON C. IKEI
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he delivered upon MICHAEL A. LILLY, ESQ., Attorney for Defendants, at his last known address, the enclosed documents on October 6, 1976.

/s/ Clayton C. Ikei
CLAYTON C. IKEI
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil Action File No. 76-0286

DELBERT KAAHANUI WAKINEKONA,

v.

ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, WINTON LEONG and EDWIN SHIMODA.

JUDGMENT

This action came on for (hearing) before the Court, Honorable DICK YIN WONG, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff's First Amended Complaint is hereby DISMISSED.

Filed In The
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
June 8, 1978

at 4 o'clock and 30 min. p.m.
WALTER A.Y.H. CHINN, CLERK
by L. C. CACHERN (Deputy)

Dated at Honolulu, Hawaii this 8th day of June 1978.

WALTER A.Y.H. CHINN
Clerk of Court

by L. C. Cachern
Clerk

UNITED STATES COURT OF APPEALS
For The Ninth Circuit

No. 78-3092
DC CV 76-0286 DYW

DELBERT KAAHANUI WAKINEKONA,
Plaintiff-Appellant,

v.

ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, WINTON LEONG and EDWIN SHIMODA.
Defendants-Appellees.

Filed In The
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
December 14, 1981
at 9 o'clock and 15 min. a.m.
WALTER A.Y.H. CHINN, Clerk

APPEAL from the United States District Court for the District of Hawaii.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED AND REMANDED.

A TRUE COPY
ATTEST December 8, 1981
Clerk of Court
by: _____ (Deputy Clerk)

Filed and entered May 26, 1981

FILED
MAY 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1581

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

Antone Olim, Edith M. Wilhelm, John Smythe, Winton Leong, and Edwin Shimoda,

Petitioners,

versus

Delbert Kaahanui Wakinekona,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Robert Gilbert Johnston
Attorney for Respondent

315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

TABLE OF CONTENTS

Page

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. THE PETITION SHOULD NOT BE GRANTED BECAUSE THE NINTH CIRCUIT COURT OF APPEALS' DECISION IS SUPPORTED BY THE MAJORITY OF THE JUDGES OF THAT COURT AND IS NOT IN CONFLICT WITH PRIOR HOLDINGS OF THAT COURT; IS NOT IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS; IS NOT IN CONFLICT WITH APPLICABLE STATE LAW; AND IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT..... 1

A. THE DECISION BELOW IS SUPPORTED BY THE MAJORITY OF THE NINTH CIRCUIT COURT OF APPEALS' JUDGES AND IS NOT IN CONFLICT WITH ITS PRIOR HOLDING..... 1, 2

B. THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER COURTS OF APPEALS' DECISIONS..... 2, 3

C. THE DECISION BELOW IS NOT IN CONFLICT WITH APPLICABLE STATE LAW..... 3

D. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT..... 3

II. THE DECISION DOES NOT INVOLVE IMPORTANT QUESTIONS REGARDING THE NATURE OF DUE PROCESS RIGHTS WHICH HAVE NOT BEEN BUT SHOULD BE RESOLVED BY THIS COURT..... 3, 4

CONCLUSION..... 4

TABLE OF AUTHORITIES

	Page
Bills v. Henderson, 631 F.2d 1287 (6th Cir. 1980)	2
Cofone v. Manson, 594 F.2d 934 (2nd Cir. 1979)	2
Jacobson v. Hannifin, 627 F.2d 177 (9th Cir. 1980)	2
Lombardo v. Meachum, 548 F.2d 13 (1st Cir. 1977)	2
Lono v. Ariyoshi, 63 Haw. ___, 621 P.2d 976 (1981)	3
Meachum v. Fano, 427 U.S. 215 (1976)	3
Memphis Light, Gas and Water Divison v. Craft, 436 U.S. 1 (1978)	3
Montanye v. Haynes, 427 U.S. 236 (1976)	3

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On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

I

THE PETITION SHOULD NOT BE GRANTED BECAUSE THE NINTH CIRCUIT COURT OF APPEALS' DECISION IS SUPPORTED BY THE MAJORITY OF THE JUDGES OF THAT COURT AND IS NOT IN CONFLICT WITH PRIOR HOLDINGS OF THAT COURT; IS NOT IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS; IS NOT IN CONFLICT WITH APPLICABLE STATE LAW; AND IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

The Petition for Writ of Ceritorari should be denied because the decision of the Ninth Circuit Court of Appeals is supported by a majority of its judges and is not in conflict with prior rulings of that court, and is not in conflict with decisions of other circuit courts of appeals, of the Hawaii state courts, or this court, because the decision is unique to its set of facts and within the power of the federal judiciary to rule on federal questions.

A. THE DECISION BELOW IS SUPPORTED BY THE MAJORITY OF THE NINTH CIRCUIT COURT OF APPEALS' JUDGES AND IS NOT IN CONFLICT WITH ITS PRIOR HOLDING.

The majority of the panel voted to deny petitioners' petition for a rehearing, and their suggestion for rehearing en banc failed to receive the affirmative vote of a majority of the active judges. The decision is clearly supported by the majority of the Ninth Circuit Court of Appeals' judges. Petition Appendix B-1.

Petitioner, citing Jacobson v. Hannifin, 627 F.2d 177, 180 (9th Cir. 1980) suggest this decision is in conflict with prior holdings. The specific question in Jacobson was the extent to which the Nevada Gaming Control Act gave the plaintiff an expectation of a right to a license to create a property interest protected by due process. In Jacobson the Ninth Circuit pointed out that the language of the Nevada statute omitted language that would create such an expectation and that a fundamental right was not at issue. The language of Hawaii prison transfer regulations includes language that created such an expectation and affected a fundamental right. The decision below is not in conflict with the Ninth Circuit's prior holdings. Indeed it is consistent with its prior holdings. See Petition Appendix A-6.

B. THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER COURTS OF APPEALS' DECISIONS.

The petitioners suggest that the decision below is in conflict with other courts of appeals' decisions. They cite Lombardo v. Meachum, 548 F.2d 13, 15 (1st Cir. 1977); Cofone v. Manson, 594 F.2d 934, 938 (2nd Cir. 1979); and Bills v. Henderson, 631 F.2d 1287, 1298-1299 (6th Cir. 1980); that rejected claims that some state procedures required by specific transfer regulations create a liberty interest protected by the due process clause. Petition 6-9. The Ninth Circuit considered the cases petitioner suggests are inharmonious with the decision below and found them distinguishable. Petition Appendix A-7.

In distinguishing these cases from this action the court stated that while these cases may be interpreted as "holding that no procedural requirements can create a substantive liberty interest, unless the events which may cause a transfer are specified in those requirements, we must disagree. The real issue is whether the transfer regulations create an entitlement to procedural protections." Petition Appendix A-7.

The Hawaii prison regulations clearly provide for specific procedures before any transfer involving a grievous loss and they define an interstate transfer as a grievous loss. Because the Hawaii regulation requires that a transfer will not be consumated absent an impartial hearing there is a justifiable expectation that a prisoner will not be transferred absent the specified procedures. Thus a constitutionally protected liberty interest arises. Petition Appendix A-8.

Additionally, the instant case is unique. The holding by the court below that respondent Wakinekona has stated a claim based on specific Hawaii prison statutes is a limited holding. The prison transfer statutes of Massachusetts and New York do not require the same elaborate procedures as Hawaii does. Petition Appendix A-6 and B-4. Therefore, the decision below is not in conflict with other circuits.

C. THE DECISION BELOW IS NOT IN CONFLICT WITH APPLICABLE STATE LAW.

Petitioners maintain that the Ninth Circuit decision conflicts with a decision of the Hawaii Supreme Court. In Lono v. Ariyoshi, 63 Haw. __, 621 P.2d 976 (1981), the Hawaii Supreme Court decided a case involving the same transfer regulations at issue here. While the Hawaii Supreme Court held that no Fourteenth Amendment liberty interest was created by the regulations "it is a Federal question whether the interest created by the state statute or regulation is to be accorded protection under the Fourteenth Amendment." (Emphasis added.) Petition Appendix B-3. See Memphis t. Gas and Water Division v. Craft, 436 U.S. 1, 9 (1978). The decision below is not in conflict with applicable state law.

D. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

Petitioners urge that the Ninth Circuit has decided the case in conflict with applicable decisions of this court. This Court, in Meachum v. Fano, 427 U.S. 215 (1976) and Montanye v. Haynes, 427 U.S. 236 (1976) held that prison transfers do not automatically trigger the protections of the due process clause of the fourteenth amendment. The Hawaii prison transfer regulations differ substantially from those at issue before this court in Fano and Haynes. Thus those cases are not controlling here. The decision of the court below is not in conflict with Fano and Haynes.

II

THE DECISION DOES NOT INVOLVE IMPORTANT QUESTIONS REGARDING THE NATURE OF DUE PROCESS RIGHTS WHICH HAVE NOT BEEN BUT SHOULD BE RESOLVED BY THIS COURT.

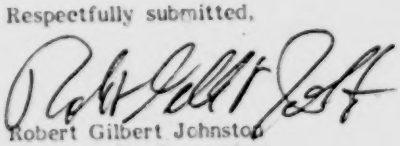
This case involves a civil rights action by a prisoner who was transferred from Hawaii to California without a due process hearing. The Ninth Circuit fully considered and discussed the substantial relevant precedent and applied it to the

unique facts of this case. The Hawaii prison transfer regulations, then in effect, specifically provided for a hearing before an impartial committee in order to protect against "arbitrary or uninformed action by the prison administration." Petition Appendix A-9. The principles of due process applied in this case are well-settled by prior decisions of this court and correctly applied by the court below.

CONCLUSION

For the aforementioned reasons the Petition for Writ of Ceritorari should be denied.

Respectfully submitted,



Robert Gilbert Johnston
Attorney for Respondent

315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

CERTIFICATE OF FILING AND SERVICE

Robert Gilbert Johnston, an attorney, states that a copy of the above document was filed with the Clerk of the United States Supreme Court and served on:

Michael A. Lilly, Esq.
First Deputy Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813

by mail on May 4, 1982.

Robert Gilbert Johnston

FILED
MAY 6 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1581

IN THE

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October Term, 1981

Antone Olim, Edith M. Wilhelm, John Smythe, Winton Leong, and Edwin Shimoda,

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To The United States Court of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Robert Gilbert Johnston
Attorney for Respondent

315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

No. 81-1581

IN THE

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October Term, 1981

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versus

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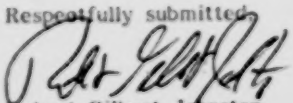
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Now comes Delbert Kaahanui Wakinekona, Respondent, by Robert Gilbert Johnston, his lawyer, and in accordance with United States Supreme Court Rule 46, asks this Court for leave to proceed in forma pauperis, and in support states that he has been incarcerated in prison for over ten years and is without funds, as more fully stated in the affidavit of Robert Gilbert Johnston attached hereto, so that he is unable to pay for the costs of this proceeding, including the printing of the brief in opposition to the petition for a writ of certiorari which this court requested Wakinekona file.

Respectfully submitted,



Robert Gilbert Johnston
Attorney for Respondent

315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

AFFIDAVIT OF ROBERT GILBERT JOHNSTON

Robert Gilbert Johnston, being first duly sworn, states:

1. The affiant is admitted to practice before this Court, is admitted to practice before Illinois and Hawaii courts, and is now a professor of law at The John Marshall Law School, Chicago, Illinois.

2. The affiant first represented Delbert Kaahanui Wakinekona in about 1972 at the request of Antone Olim, then warden of the Hawaii State Prison in Honolulu, where Wakinekona was incarcerated, in seeking to commute Wakinekona's sentence from life without the possibility of parole to life.

3. The affiant is familiar with Wakinekona's records in Hawaii and from the time he first undertook to represent Wakinekona until Wakinekona was transferred to California spoke to Wakinekona at regular intervals either in person or by telephone.

4. The affiant is familiar with some of Wakinekona's records in California which have been provided to him by California officials and has spoken to Wakinekona about once a month by telephone since Wakinekona was transferred to California.

5. The affiant or Clayton C. Ikei, who is licensed to practice before the California and Hawaii courts and is co-counsel in this case, are the only lawyers who have advised or represented Wakinekona since 1972 with the exception of one administrative hearing when Wakinekona was represented by the Hawaii Public Defender.

6. The affiant and Clayton C. Ikei have represented Wakinekona without charge on all occasions, except, two, when they were reimbursed by the State of Hawaii for their services, since Wakinekona is incarcerated and without funds to pay for legal services.

7. The affiant knows Wakinekona's parents and siblings who also are unable to assist Wakinekona financially for legal services.

8. The affiant spoke to Wakinekona about the necessity of filing a reply to the Petition for a Writ of Certiorari in this cause and was advised that Wakinekona is still without funds.

9. Wakinekona has not sought to proceed in forma pauperis before in this action.

Robert Gilbert Johnston

Subscribed and sworn to before me
this 4th day of May, 1982.

Notary Public

My commission expires on
October 31, 1984.

CERTIFICATE OF FILING AND SERVICE

Robert Gilbert Johnston, an attorney, states that a copy of the above document was filed with the Clerk of the United States Supreme Court and served on:

Michael A. Lilly, Esq.
First Deputy Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813

by mail on May 4, 1982.

Robert Gilbert Johnston

Office - Supreme Court, U.S.
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CLERK

No. 81-1581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, WINTON LEONG, AND EDWIN SHIMODA,
Petitioners,

VS.

DELBERT KAAHANUI WAKINEKONA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

BRIEF OF PETITIONERS SUPPORTING REVERSAL

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QUESTIONS PRESENTED

The Petitioners will address the following questions:

1. Whether state-created prisoner pre-transfer hearing rules, which do not limit or proscribe the exercise of prison official discretion in any way, trigger the Due Process Clause of the United States Consitution?

2. Whether state-created regulations guaranteeing prisoners specified procedural protections before any transfer involving a potential "grievous loss", but which contain no standards proscribing official discretion in any way, create a liberty interest subject to due process protection?

3. Whether the allegation that a prisoner was denied an independent hearing body guaranteed by State regulations, where the hearing body merely makes a recommendation to the ultimate decision-maker whose discretion is not proscribed or limited in any way by the recommendation, states a claim under 42 U.S.C. § 1983?

LIST OF PARTIES AFFECTED

Except for the persons listed in the caption, there are no other parties affected by this case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AFFECTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTES INVOLVED	2
REGULATION INVOLVED	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE DECISION WHETHER TO TRANSFER RESPONDENT TO THE MAINLAND DID NOT IMPLICATE A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE	8
A. Respondent Has No Liberty Or Property Interest In Remaining In The Hawaii Prison System	8
1. Transfer of a Prisoner From Hawaii to a Mainland Institution Because He is a Threat to Prison Staff and the Orderly Running of the Hawaii Prison System is within the Range of Custody Authorized by a Criminal Conviction and Sentence	10
2. Confinement in California Is Well Within The Contemplation Of A Criminal Conviction And Sentence In Hawaii	11
B. Rule IV Does Not Bestow Respondent With A Legitimate Claim Of Entitlement To Remain In The Hawaii Prison System	14
1. A Statute, Regulation, Administrative Practice, Contractual Agreement or Other Mutual Understanding Creates a Liberty Interest Only If It Conditions the Discretion of Prison Officials to Take Specified Actions only on the Basis of Objective Criteria	14

Table of Contents Continued

Page

2. Rule IV Does Not Create a Liberty Interest in Inmates Not to be Transferred to the Mainland 15

II. FAILURE TO REVERSE THE NINTH CIRCUIT DECISION WOULD ACHIEVE MISCHIEVOUS RESULTS AND WOULD FRUSTRATE PRUDENT CORRECTIONAL PRACTICES 18

CONCLUSION 21

TABLE OF AUTHORITIES

CASES: Page

Anthony v. *Wilkinson*, 637 F.2d 1130 (7th Cir. 1980), vacated sub nom. *Hawaii, et al.* v. *Medeiros, et al.*, 453 U.S. 902 (1981) 13

Arnett v. *Kennedy*, 416 U.S. 134 (1974) 15

Bell v. *Wolfish*, 441 U.S. 520 (1979) 11

Bills v. *Henderson*, 631 F.2d 1287 (6th Cir. 1980) 18

Board of Regents v. *Roth*, 408 U.S. 564 (1972) 9

Booth v. *Hammock*, 605 F.2d 661 (2d Cir. 1979) 18

Cafeteria Workers v. *McElroy*, 367 U.S. 886 (1961) .. 9

Cofone v. *Manson*, 594 F.2d 934 (2d Cir. 1977) 18

Connecticut Board of Pardons v. *Dumschat*, 452 U.S. 458 (1981) 14

Four Certain Unnamed Inmates of Mass., Etc. v. *Hall*, 550 F.2d 1291 (1st Cir. 1977) 17-18

Gittlemacker v. *Prosse*, 428 F.2d 1 (3rd Cir. 1970) ... 10

Goss v. *Lopez*, 419 U.S. 565 (1975) 14

Greenholtz v. *Nebraska Penal Inmates*, 442 U.S. 1 (1979) 14, 17

Hillen v. *Director*, 455 F.2d 510 (9th Cir. 1972) 13

Jones v. *North Carolina Prisoners' Union*, 433 U.S. 119 (1977) 10, 11

Lombardo v. *Meachum*, 548 F.2d 13 (1st Cir. 1977) .. 17

Lono v. *Ariyoshi*, Hawaii, 63 Haw. 138, 621 P.2d 976 (1981) 8, 9, 13, 17, 20, 21

Meachum v. *Fano*, 427 U.S. 215 (1976) ..... *passim*

Moody v. *Dagget*, 429 U.S. 78 (1976) 9

Morrisey v. *Brewer*, 408 U.S. 471 (1972) 9, 14

Pell v. *Procunier*, 417 U.S. 817 (1974) 11

Peterson v. *Davis*, 421 F. Supp. 1220 (E.D. Va. 1976, aff'd 562 F.2d 48 (4th Cir. 1977) 18

Price v. *Johnston*, 334 U.S. 266 (1948) 10

Procunier v. *Martinez*, 416 U.S. 396 (1974) 11, 19

Pugliese v. *Nelson*, 617 F.2d 916 (2d Cir. 1980) 18

Table of Authorities Continued

Page

Vitek v. *Jones*, 445 U.S. 480 (1980) 10, 12, 14

Wakinekona v. *Olim*, 459 F. Supp. 473 (D. Hi. 1978), rev'd 664 F.2d 708 (9th Cir. 1981) 1

Withrow v. *Larkin*, 421 U.S. 35 (1975) 16

Wolff v. *McDonnell*, 418 U.S. 539 (1974) . 10, 11, 14, 19, 21

CONSTITUTION:

United States Constitution: Fourteenth Amendment .. 2

STATUTES:

28 U.S.C. Section 1254(1) 2

42 U.S.C. Section 1983 ..... i, 3

Hawaii Revised Statutes, Chapter 355 2

Hawaii Revised Statutes, Section 706-672(1) 2, 6, 13

RULES AND REGULATIONS:

Rule IV, Supplemental Rules and Regulations of the Corrections Division of the State of Hawaii ... *passim*

IN THE

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OCTOBER TERM, 1981

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Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

BRIEF OF PETITIONERS SUPPORTING REVERSAL

OPINIONS BELOW

The original decision and amendment of decision of the United States Court of Appeals for the Ninth Circuit is attached to the Petition for Writ of Certiorari as Appendices A and B and was published as *Wakinekona* v. *Olim*, 664 F.2d 708 (9th Cir. 1981).

The decision of the District Court for the District of Hawaii was published as *Wakinekona* v. *Olim*, 459 F.Supp. 473 (D.Hi. 1978).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 26, 1981. The judgment was amended on November 27, 1981. The Petitioners' Motion for Reconsideration and Suggestion for Rehearing *En Banc* was denied on November 27, 1981. The majority of the Ninth Circuit voted against rehearing. Jurisdiction to review the judgment of the Court of Appeals is conferred on this court by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> Section 1. All persons born or naturalized in the Unites States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Hawaii Revised Statutes, § 355-1:

The Western Interstate Corrections Compact is found in the Appendix F, at F-1a-7a.[1]

Hawaii Revised Statutes, § 706-672(1):

> § 706-672 Place of imprisonment. (1) When a person is sentenced to imprisonment for an indeterminate

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[1] Counsel for Respondent refused to agree to a Joint Appendix.

term, the court shall commit him to the custody of the department of social services and housing for the term of his sentence and until released in accordance with law. The court shall determine the initial place of confinement and the director shall determine the proper program of redirection and any subsequent place of confinement best suited to meet the individual needs of the committed person.

42 U.S.C. § 1983, Civil action for deprivation of rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

REGULATION INVOLVED

Rule IV of the Supplemental Rules and Regulations of the Corrections Division of the State of Hawaii, which is the subject of this case, is attached to the Petition as Appendix D.

STATEMENT OF THE CASE

Respondent, sentenced to life imprisonment without parole by a Hawaii state court, was an inmate of the Maximum Control Unit ("MCU") of the Hawaii State Prison ("HSP"). "He is considered to be the most dangerous and assaultive inmate in the Hawaii prison system." Appendix A, at A-2.

Rule IV of the Corrections Division (Appendix D) provides for a procedural hearing prior to an inmate's mainland transfer. The hearing panel—called a program committee—provides the administrator with a recommendation whether to transfer. The administrator has the discretion, however, to decide whether and where to transfer the inmate. The administrator's discretion is plenary, absolute and unfettered by any conditions or standards. Accordingly, the Rule does not purport to condition a prison administrator's power to transfer an inmate, other than to afford the inmate a right to a procedural hearing.

On August 5, 1976, Respondent received a notice that, on August 10, 1976, he would appear before a program committee:

> [t]o determine whether your classification with the Corrections Division should be changed. The Committee will consider your entire file, your changing needs, resources and facilities available to the Corrections Division, security of State facilities and personnel, and needs of the other inmates. The Committee will consider whether you should remain at HSP, be transferred to another Hawaii facility or be transferred to a mainland state or federal institution. Exhibit A to First Amended Complaint, Appendix G, at G-15a.

On August 10, 1976, Respondent appeared before the program committee, where he was given all the procedural rights guaranteed by Rule IV. On August 11, 1976, the committee, which was concerned about the threat Respondent presented to the security and safety of Hawaii's prison system, recommended that he be transferred to the mainland:

> The Program Committee, having reviewed your entire file, your testimony and arguments by your

> counsel, concluded that your control classification remains at Maximum. You are still considered a security risk in view of your escapes and subsequent convictions for serious felonies. The Committee noted the progress you made in vocational training and your expressed desire to continue in this endeavor. However your relationship with staff, who reported that you threaten and intimidate them, raises grave concerns regarding your potential for further disruptive and violent behavior. Since there is no other Maximum security prison in Hawaii which can offer you the correctional programs you require and you cannot remain at MCU because of impending construction of a new facility, the Program Committee recommends your transfer to an institution on the mainland. *Id.*

On August 11, 1976, the prison administrator affirmed the recommendation and, with the approval of the Director of the Department of Social Services and Housing and the Governor of Hawaii, transferred Respondent to Folsom State Prison in California.

Respondent filed suit in the United States District Court for the District of Hawaii, alleging, *inter alia*, that the procedures adhered to in his transfer hearing were in violation of the Due Process Clause of the United States Constitution.

The District Court dismissed the complaint on the ground that, under Rule IV (Appendix D), the prison administrator had unlimited discretion, not subject to standards governing the exercise thereof, to transfer prisoners to the mainland. It therefore concluded that since Respondent's transfer did not implicate a constitutionally protected liberty interest, due process did not attach. *See* Appendix C.

The United States Court of Appeals for the Ninth Circuit, in a split (2 to 1) decision, reversed on the ground

that the right to a state-guaranteed procedural hearing in Rule IV creates a "justifiable expectation" in having a hearing before transfer and thus triggers the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *See* Appendix A. The Ninth Circuit nevertheless recognized that its conclusion was in conflict with the "First, Second, and Sixth Circuits." Appendix A, at A-7.

Petitioners filed a Motion or Reconsideration and Suggestion for Rehearing *En Banc* alleging, *inter alia*, that a recent Hawaii Supreme Court case (*Lono* v. *Ariyoshi*, Hawaii, 63 Haw. 138, 621 P.2d 976 (1981) (Appendix E to Petition)) held that Rule IV's hearing procedure did not trigger due process protections:

> Thus, H.R.S. § 706-672 and Rule IV of the Rules did not clothe plaintiff with the requisite liberty interest which would have triggered the application of the procedural requirements under the fourteenth amendment of the United States Constitution. Appendix E, at E-11.

The Ninth Circuit denied the motion in a split, 2 to 1, decision on November 27, 1981. *See*, Appendix B.

Your Petitioners now seek reversal of the decision of the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT

I

A. The protections of the Due Process Clause extend only to state action that deprives a person of "liberty" or "property". In determining whether a mainland transfer implicates a "liberty" interest, it is instructive to remember that the exigencies of imprisonment for violation of law demand the suspension of rights and privileges

normally enjoyed by law-abiding citizens. A criminal conviction ordinarily extinguishes an inmate's personal liberty to the extent of "the normal limits or range of custody which the conviction has authorized the State to impose." *Meachum* v. *Fano*, 427 U.S. 215, 225 (1976).

Mainland transfers are well within the contemplation of a Hawaii inmate's criminal conviction and sentence and therefore do not create or infringe on a prisoner's liberty interest. Firstly, such transfers are made for a variety of penological reasons, the most important of which is the maintenance of institutional safety and security. A number of courts have thus upheld the constitutionality of mainland transfers of Hawaii inmates. Secondly, the laws, regulations, and historic pattern of practice in Hawaii contemplate that some prisoners will be transferred to the federal or other state prison systems. Accordingly, the conditions of Folsom Prison were well within the contemplation of Respondent's conviction and sentence.

B. A state-created liberty interest exists only when a state has bound itself to take specified actions on the basis of determinable and objective criteria. The purpose of the Due Process Clause is to reduce the risk that the bases for which official action is taken will deviate from the established criteria. However, where, as here, the State has established no criteria, where official discretion is unfettered, and where the inmate has, at best, but a mere unilateral expectation that he will not be transferred no liberty interest exists. Under Rule IV, no facts need to be found as a predicate to an interstate transfer. Respondent could have been transferred for any reason or for no reason at all.

Thus, whatever expectation Respondent had in remaining in the Hawaii prison system was too ephemeral and insubstantial to trigger the Due Process Clause.

ARGUMENT

I. THE DECISION WHETHER TO TRANSFER RESPONDENT TO THE MAINLAND DID NOT IMPLICATE A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE

The classification process, as it is implemented in the Hawaii prison system and as it has been interpreted by the Hawaii Supreme Court, is a means by which prison administrators are able to monitor an inmate and determine, on an ongoing basis, his optimum placement in the Corrections Division. As Rule IV makes clear, rather than being concerned with isolated aspects of an inmate's adjustment, classification is a "dynamic process which considers the individual, his history, his changing needs, the resources and facilities available to the Corrections Division, the other inmates/wards, the exigencies of the community, and any other relevant factors." Appendix D, at D-1.

As the Hawaii Supreme Court observed, the classification process is to be distinguished from the adjustment process in that its use is not intended as a punitive measure. *Lono*, Appendix E, at E-6.

Whatever expectation Respondent may have had to remain in the Hawaii state prison system was too ephemeral and insubstantial to implicate due process since a transfer to the mainland was within the contemplation of Respondent's criminal conviction and since Hawaii prison officials had absolute discretion to transfer him for any reason or for no reason at all.

A. Respondent Has No Liberty or Property Interest in Remaining in the Hawaii Prison System

The procedural protections of the Due Process Clause extend only to state action that deprives a person of "liberty" or "property." As this Court has explained, "the

range of intersts protected by procedural due process is not infinite." *Board of Regents* v. *Roth*, 408 U.S. 564, 570 (1972). Particularly with respect to actions affecting prisoners, this Court has observed that not all deprivations implicate due process:

> [T]o hold . . . that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts. *Meachum* v. *Fano*, *supra*, 427 U.S. at 225; (emphasis in original).[2]

See also *Moody* v. *Daggett*, 429 U.S. 78, 88 n.9 (1976).

In determining whether process is due, the inquiry "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); and *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961).

At the outset, it is instructive to remember that this case does not involve rights of the general public. The

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[2] The Ninth Circuit's decision erroneously states that Rule IV defines an interstate transfer as a "grievous loss." Appendix A, at A-7. While Rule IV guarantees its procedures for a "transfer [which] involves a grievous loss" (Appendix D, at D-1), nothing in the Rule clearly states that Respondent's interstate transfer constitutes a "grievous loss" or that, assuming such a loss, that it creates a liberty interest. We take the position that not every "grievous loss visited upon a person by the state" (*Meachum*, *supra*, 427 U.S. at 224) creates a liberty interest. The Hawaii Supreme Court declined to find such an interest in Hawaii's Rule. *Lono* v. *Ariyoshi*, *supra*, Appendix E, at E-11. This Court should not deviate from that conclusion. Otherwise, the mere transfer of a prisoner from Hawaii to a mainland institution would bring such a transfer within the ambit of the Due Process Clause and would subject the State to the plethora of litigation that such a conclusion would generate.

exigencies of imprisonment for violation of law demand the suspension of rights and privileges normally enjoyed by law-abiding citizens. *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 129 (1977); and *Wolff* v. *McDonnell*, 418 U.S. 539, 561 (1974). Such "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U.S. 266, 285 (1948). While this is not to say that an inmate retains no constitutionally cognizable liberty interests (*Wolff*, *supra*, 418 U.S. at 555-556), it is firmly established that a criminal conviction extinguishes a prisoner's liberty to the extent of "the normal limits or range of custody which the conviction has authorized the State to impose" *Meachum*, *supra*, 427 U.S. at 225. *See Gittlemacker* v. *Prosse*, 428 F.2d 1, 3 (3rd Cir 1970) ("the denial of his right to drink from the cup of freedom is the very hypostasis of confinement.")

Because an interstate transfer—in its purpose and in the means by which it has been implemented in Hawaii—is within the range of custody authorized by a criminal conviction, Respondent had no legitimate expectation that he would not be transferred to California, any more than he would not be transferred from a minimum security institution to a more severe and restrictive institution of greater custody. Compare *Meachum* v. *Fano*, *supra*, with *Vitek* v. *Jones*, 445 U.S. 480 (1980).

1. Transfer of a prisoner from Hawaii to a mainland institution because he is a threat to prison staff and the orderly running of the Hawaii Prison System is within the range of custody authorized by a criminal conviction and sentence.

It is inconceivable to us that a criminal sentence would not contemplate that a prison administrator has the in-

herent and plenary power to transfer an inmate who is a threat to staff and to the orderly operation of the prison.

This Court frequently has recognized that the paramount concern of a correctional system is the safeguarding of internal security. *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1979); *Jones* v. *North Carolina Prisoners' Union*, *supra*, 433 U.S. at 132; *Pell* v. *Procunier*, 417 U.S. 817, 823 (1974); and *Procunier* v. *Martinez*, 416 U.S. 396, 404 (1974).

Respondent was transferred to California for three reasons. Firstly, because he was a "security risk", in light of his long criminal record. Secondly, because he was a threat to institutional security, in light of his predilection to "threaten and intimidate" staff. Thirdly, because there was no facility in Hawaii sufficiently secure to offer Respondent the "correctional programs you require . . ." Appendix G, at G-15a-16a.

It would be imprudent to restrict the discretion of prison administrators to transfer such an inmate out of the Hawaii prison system to a larger and more secure environment in California. It also strains credulity to suggest that such an important tool in the safeguarding of institutional security would not be anticipated by a criminal conviction and sentence.

2. Confinement in California is well within the contemplation of a criminal conviction and sentence in Hawaii.

It has not been suggested, nor could it be successfully argued, that confinement in California is not within the contemplation of Respondent's conviction in Hawaii.

In *Wolff* the Court dealt with the due process requirements attendant upon punishment of inmates for misconduct in the prison. Inherent in this inquiry was the ob-

vious fact that any punishment inflicted was not part of the original criminal conviction, since it was being imposed exclusively for post-conviction misconduct.[3]

The purpose of Respondent's interstate transfer, however, was not punishment, but rather the maintenance of institutional security. Whether or not the facilities used in California are more secure than in Hawaii is irrelevant to this inquiry, although it is noteworthy that Respondent was transferred from Hawaii's Maximum Security Unit ("MCU") to California's Folsom Prison. In his brief before the Ninth Circuit, Respondent described both maximum security institutions as "holes". Perhaps this is because both offer maximum surveillance which is required by the most recalcitrant and dangerous of prisoners, such as Respondent.

There is no suggestion, however, that Folsom Prison constitutes cruel and unusual punishment or is otherwise an unconstitutional form of incarceration.

Nor can it be suggested that Respondent had more than a unilateral expectation that he would not be transferred to the mainland.

Firstly, it is common knowledge that Hawaii inmates of the most obstreperous variety are commonly transferred to the mainland.

For example, a number of cases have upheld the constitutionality of mainland transfers of Hawaii inmates

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[3] In *Vitek* v. *Jones*, where the point was perhaps less self-evident, the Court concluded that a criminal conviction did not bring within its ambit the commitment of the convict to a mental institution. Here, by contrast, the purposes for which a mainland transfer was imposed and the nature of the actual conditions to which Respondent is subjected in California demonstrate that such confinement is well within the contemplation of the original criminal conviction and sentence.

(*Anthony* v. *Wilkinson*, 637 F.2d 1130 (7th Cir. 1980), vacated sub nom *Hawaii, et al.* v. *Medeiros, et al.*, 453 U.S. 902 (1981) (three Hawaii inmate transferred to Illinois Federal Prison); *Hillen* v. *Director*, 455 F.2d 510, 511 (9th Cir. 1972) (Hawaii inmate transferred to Folsom Prison); and *Lono* v. *Airyoshi*, *supra*, (interstate transfer of Hawaii inmate)). Even the Ninth Circuit's opinion herein concluded that "an inmate's transfer from Hawaii State Prison to a state prison in California does not raise any constitutional issues." Appendix A, at A-5, n 1.

Secondly, the Western Interstate Corrections Compact, Hawaii Revised Statutes, § 706-672, and rule IV place all Hawaii inmates on at least constructive notice that they might be transferred to a mainland institution.

For example, Rule IV, provides for the right to counsel before the program committee "[f]or a potential Interstate transfer." *See* Appendix D, at D-6. The existence of the Western Interstate Corrections Compact, by definition, contemplates the interstate transfer of inmates.

The possibility of a transfer to the mainland and the conditions of the prisons of which, we submit, are well within the "normal limits or range of custody" that a crimnal conviction authorizes a state to impose.

Therefore, if Respondent has any right to remain in Hawaii, it must arise from something other than the Due Process Clause itself, namely, from the statutes, regulations, or rules governing the terms of his confinement.

B. Rule IV Does Not Bestow Respondent With A Legitimate Claim Of Entitlement To Remain In The Hawaii Prison System

1. A statute, regulation, administrative practice, contractual agreement or other mutual understanding creates a liberty interest only if it conditions the discretion of prison officials to take specified actions only on the basis of objective criteria

A liberty interest exists only when the state has bound itself to take specified actions on the basis of determinable facts or objective criteria. As Justice Brennan stated in his concurring opinion in *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 467 (1981), a claimant must show:

> that particularized standards or criteria guide the State's decisionmakers. . . . The *structure* of the State's decisionmaking process is thus as significant as the likely *result* of that process. Respondents have not shown that the Board is required to base its decision on objective and defined criteria. . . . Accordingly, I agree that respondents have no protectible liberty interest. . . . (Emphasis in original.)

See also *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, at 10 (1979); *Meachum*, *supra*, 427 U.S. at 226-227.

Thus, for example, in *Wolff* the inmates had a statutory right not to have their good-time credits forfeited except for "flagrant or serious misconduct"; the parolee in *Morrissey* v. *Brewer*, *supra*, had a statutory right to remain free unless he violated the terms of his parole; and the student in *Goss* v. *Lopez*, 419 U.S. 565 (1975), had a right to attend public school unless he was guilty of misconduct. See also *Vitek* v. *Jones*, *supra*, (state prison inmate has a right not to be transferred to a mental hospital unless he "suffers from a mental disease or defect" that cannot be treated in prison).

On the other hand, where the state has not established rules that condition decisions on objective criteria, there can be no legitimate claim of entitlement. In *Meachum*, for example, in which the state had not conditioned inter-prison transfers on proof of specific events, the inmate had no legitimate entitlement not to be transferred from a medium-security prison to a maximum-security facility. Similarly, in *Dumschat*, in which the Board of Pardons possessed "unfettered discretion" (452 U.S. at 466) to grant commutations of sentences and pardons, the inmate had no legitimate expectation that his life sentence would be commuted, notwithstanding the fact that the Board of Pardons granted approximately three-fourths of the applications for commutation of life sentences that it received.

The teaching of these cases is that, where there is no requirement that prison officials predicate their discretion on objective and determinable facts or criteria, the inmate has no legitimate entitlement in the exercise of that discretion; in such circumstances, the procedural protections of due process are not implicated. See *Arnett* v. *Kennedy*, 416 U.S. 134, 181 (1974) (White, J., concurring in part and dissenting in part).

2. Rule IV does not create a liberty interest in inmates not to be transferred to the mainland

It is not open to question that a state may create, through regulations, a liberty interest in a matter which might otherwise be left to the unfettered exercise of official discretion. However, mere pre-transfer regulations, which do nothing more than bestow upon an inmate the right to a series of procedural steps prior to his interstate transfer, and which do not otherwise purport to condition or restrain the exercise of official discretion

in determining whether to transfer or not, do not create a liberty interest.[4]

Firstly, Rule IV itself does not purport to condition a prison administrator's power to transfer an inmate, other than to afford the inmate a right to a hearing. Rule IV sets forth no objective standards and establishes no objective criteria.

The discretion whether to convene a program committee and whether to ultimately transfer an inmate is also unconditioned. The Rule squarely places limitless discretion on a prison administrator, after receipt of the program committee's recommendation, to "[a]ffirm or reverse, in whole or part, the recommendation. . . ." Appendix D, at D-5. Thus, Rule IV bestows upon a prison administrator the final authority to transfer a prisoner "for whatever reason or for no reason at all." *Meachum, supra*, 427 U.S. at 228.

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[4] The Ninth Circuit erroneously assumed that Rule IV guarantees the right to an unbiased program committee, protectible under the Due Process Clause. Appendix A, at E-9. Respondent's claim of bias is predicated on the fact that his program committee previously reviewed his situation in the Maximum Control Unit and was otherwise prejudiced against him personally. However, for purposes of constitutional due process, which we submit is not before the court, "the mere exposure [to an adjudicatory body] to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness" of the body. *Withrow* v. *Larkin*, 421 U.S. 35 (1975). The program committee is imbued with "a presumption of honesty and integrity" which must be overcome by objective and concrete evidence of actual bias." *Id.* at 47.

In this case, Respondent must overcome several threshold issues before the question of bias becomes relevant. Firstly, he must establish a liberty interest in having a program committee which is not personally biased against him, which he cannot. Secondly, he must establish bias in the prison administrator, who transferred him,

Secondly, unlike *Greenholtz, supra*, 442 U.S. at 12, in which this Court was "denied the benefit of the Nebraska courts' interpretation of the scope of interest, if any, the statute was intended to afford to inmates", we have in this case the unamimous determination by the Hawaii Supreme Court of the interest created by Rule IV. In *Lono* v. *Ariyoshi, supra* (Appendix E), the Court concluded that Rule IV:

> 1. "do[es] not limit the authority of the director of DSSH" to transfer an inmate to the mainland (*Id.*, at E-10);
> 2. "contain[s] no standards governing the determination by the director of DSSH" to transfer an inmate [*Id.*, at E-11];
> 3. leaves "the determination of those matters [*i.e.*, interstate transfers] entirely to the discretion of the director" [*Id.*]; and
> 4. "did not clothe plaintiff with the requisite liberty interest" protectible under the Due Process Clause [*Id.*].

Finally, every Circuit Court of Appeal which has ruled on this issue disagrees with the conclusion of the Ninth Circuit:

> FIRST CIRCUIT: *Lombardo* v. *Meachum*, 548 F.2d 13, 15-16 (1st Cir. 1977) (Where there are no substantive limitations on an administrator's discretion, the right to procedural safeguards does not create substantive protections.); and *Four Certain Unnamed Inmates of Mass., Etc.* v. *Hall*, 550 F.2d 1291, 1292

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which he has not alleged. Finally, he must overcome the presumption of honesty and integrity, which he cannot.

Even if state officials were in violation of their own regulations regarding composition of the program committee, such a deviation would not be of constitutional dimension. Indeed, the implications of "constitutionalizing" all state policies and regulations would be great. This was recognized even by the majority of the Ninth Circuit panel below.

(1st Cir. 1977) ("Prison regulations which grant a right to hearings prior to transfer do not trigger the Due Process Clause.").

SECOND CIRCUIT: *Confone* v. *Manson*, 594 F.2d 934, 938 (2d Cir. 1977) (No liberty interest "entitlement can derive from a statute that merely establishes procedural requirements.") *Booth* v. *Hammock*, 605 F.2d 661, 664-665 (2d Cir. 1979) ("The State *procedural* requirements that he alleges have not been observed do not create interests entitled to due process protection. . . ."); and *Pugliese* v. *Nelson*, 617 F.2d 916, 824 (2d Cir. 1980).

FOURTH CIRCUIT: *Peterson* v. *Davis*, 421 F.Supp. 1220 (E.D. Va. 1976), *aff'd*, 562 F.2d 48 (4th Cir. 1977) (Affirmed a decision which held that promulgated transfer hearing procedures do not trigger due process and thus hearings were "not constitutionally required.").

SIXTH CIRCUIT: *Bills* v. *Henderson*, 631 F.2d 1287, 1298 (6th Cir. 1980) ("[P]rocedural rules created by state administrative bodies cannot, of themselves, serve as a basis for a separate protected liberty interest.").

The procedure set forth in Rule IV simply does not establish any criteria upon which a liberty interest could attach.

II. FAILURE TO REVERSE THE NINTH CIRCUIT DECISION WOULD ACHIEVE MISCHIEVOUS RESULTS AND WOULD FRUSTRATE CORRECTIONAL PRACTICES

Hawaii adopted Rule IV because it determined that "prudent prison administration requires pretransfer hearings". *Meachum*, *supra*, 427 U.S. at 229. While Hawaii felt that it was necessary and important to involve inmates in the process by which it is ultimately decided whether they will be visited with an interstate transfer, Hawaii was careful not to constrain official discretion in

order to preclude the possible constitutionalization of Rule IV.

Unfortunately, the Ninth Circuit found otherwise and, despite Hawaii's obvious intent to the contrary, held that Rule IV triggered the application of the Due Process Clause. This decision should not be upheld for a number of important considerations.

First, the Ninth Circuit's opinion will do little more than discourage prison administrators from adopting pre-transfer hearing procedures and, indeed, encourage them to eliminate those already in effect. Such a result would frustrate "prudent prison administration" and would not be in the best interests of the inmates for whom Rule IV was adopted.

Second, "transfers between institutions", whether inter- or intra-state, "are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of an inmate." *Meachum, supra*, 427 U.S. at 225. Courts ought to leave considerable leeway in this area for the exercise of discretion by informed prison officials. To hold otherwise would place the federal judiciary "astride the day-to-day functioning of state prisons and involve the judiciary in issues of discretionary decisions that are not the business of federal judges." *Meachum, supra*, 427 U.S. at 228-229[5]

Third, the close relationship of interstate transfers with the need to maintain institutional safety and security should compel reticence in finding a liberty interest. These are the matters best left to the expertise of officials

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[5] In *Wolff, supra*, 418 U.S. at 561-567 and in *Procunier, supra*, 416 U.S. at 404-405, this Court recognized that the callous and recalcitrant nature of imprisoned criminals and the complex and intractable" difficulties of prison management contributed toward a "broad hands-off attitude [by the courts] toward problems of prison management. . . ."

who are charged with the duty of maintaining the security of our prisons.

Fourth, the Ninth Circuit's opinion places an intolerable burden on the judiciary to define at what point a state has established a sufficient number of procedures to trigger the Due Process Clause. The Ninth Circuit held that a liberty interest was created merely because Rule IV was so "detailed." (*See* footnote 4 at 664 F.2d 712, which was mistakenly omitted from Appendix A.) The decision assumes, without deciding, that something less than Hawaii's Rule IV would not implicate due process. However, this begs the question as to what threshold quantum of procedure is necessary to create a liberty interest. We submit that to answer that question would propel the federal judiciary into an esoteric definitional morass. Rule IV is but a string of procedural rights unconnected by any substantive limitations. Respondent has no reasonable expectation or stake in the outcome of a program commitee hearing and nothing short of a strained and torturous legal analysis is necessary to find anything of substance lurking in the depths of the Rule.

Finally, the Ninth Circuit's cursory examination of the Hawaii Supreme Court Decision in *Lono* v. *Ariyoshi*, *supra*, fails to accord the proper deference that must be given by federal courts to the interpretation of state laws by state courts. In its original opinion, the Ninth Circuit recognized that a state court might construe a regulation as creating a liberty interest (Appendix A, at A-7 n. 3), but, in its amendment, summarily dismisses the Hawaii Supreme Court's conclusion as somehow not inconsistent with its strained interpretation of Rule IV. The Ninth Circuit cannot have it both ways. The Ninth Circuit must give more than mere deference to the *Lono* decision. It must accept the conclusion that Rule IV, by definition, leaves the matter of interstate transfers "entirely to the

discretion of the director." *Lono, supra*, Apendix E, at E-11. Once it does so, it is difficult, if not impossible, to conceive how the Due Process Clause can be triggered in this case.

Discretion should be left to Hawaii prison officials to operate Rule IV "without being subjected to [the] unduly crippling constitutional impediments" of the Due Process Clause. *Wolff, supra*, 418 U.S. at 566-567.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be REVERSED.

DATED: Honolulu, Hawaii, August 16, 1982

Respectfully submitted,

MICHAEL A. LILLY
First Deputy Attorney General
State of Hawaii
Counsel of Record

JAMES H. DANNENBERG
Deputy Attorney General
Attorneys for Petitioners

APPENDIX

APPENDIX F

CHAPTER 335
WESTERN INTERSTATE CORRECTIONS COMPACT

SECTION

355-1 COMPACT
355-2 COMMITMENT OR TRANSFER OF INMATE
355-3 ENFORCEMENT
355-4 HEARING
355-5 CONTRACTS

§ 355-1 Compact. The Western Interstate Corrections Compact as contained herein is hereby enacted into law and entered into on behalf of the State of Hawaii with any and all other states legally joining therein in a form as follows:

WESTERN INTERSTATE CORRECTIONS COMPACT

Article 1. Purpose and Policy

The party states, desiring by common action to improve their institutional facilities and provide programs of sufficiently high quality for the confinement, treatment, and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on a basis of cooperation with one another, thereby serving the best interests of such offenders and of society. The purpose of this compact is to provide for the development and execution of such programs of cooperation for the confinement, treatment, and rehabilitation of offenders.

Article 2. Definitions

As used in this compact, unless the context clearly requires otherwise:

(a) "State" means a state of the United States, and Guam.

(b) "Sending state" means a state party to this compact in which conviction was had.

(c) "Receiving state" means a state party to this compact to which an inmate is sent for confinement other than a state in which conviction was had.

(d) "Inmate" means a male or female offender who is under sentence to or confined in a prison or other correctional institution.

(e) "Institution" means any prison, reformatory or other correctional facility (including but not limited to a facility for the mentally ill or mentally defective) in which inmates may lawfully be confined.

Article 3. Contracts

(a) Each party state may make one or more contracts with any one or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states. Any such contract shall provide for:

(1) Its duration.

(2) Payments to be made to the receiving state by the sending state for inmate maintenance, extraordinary medical and dental expenses, and any participation in or receipt by inmates of rehabilitative or correctional services, facilities, programs or treatment not reasonably included as part of normal maintenance.

(3) Participation in programs of inmate employment, if any, the disposition or crediting of any payments received by inmates on account thereof; and the crediting of proceeds from or disposal of any products resulting therefrom.

(4) Delivery and retaking of inmates.

(5) Such other matters as may be necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving states.

(b) Prior to the construction or completion of construction of any institution or addition thereto by a party state, any other party state or states may contract therewith for the enlargement of the planned capacity of the institution or addition thereto, or for the inclusion therein of particular equipment or structures, and for the reservation of a specific percentum of the capacity of the institution to be kept available for use by inmates of the sending state or states so contracting. Any sending state so contracting may, to the extent that monies are

legally available therefor, pay to the receiving state, a reasonable sum as consideration for such enlargement of capacity, or provision of equipment or structures, and reservation of capacity. Such payment may be in a lump sum or in installments as provided in the contract.

(c) The terms and provisions of this compact shall be a part of any contract entered into by the authority of or pursuant thereto, and nothing in any such contract shall be inconsistent therewith.

Article 4. Procedures and Rights

(a) Whenever the duly constituted judicial or administrative authorities in a state party to this compact, and which has entered into a contract pursuant to Article 3, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary in order to provide adequate quarters and care or is desirable in order to provide an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

(b) The appropriate officials of any state party to this compact shall have access, at all reasonable times, to any institution in which it has a contractual right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.

(c) Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, for transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state; provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of Article 3.

(d) Each receiving state shall provide regular reports to each sending state in the inmates of that sending state in institutions pursuant to this cmpact including a conduct record of each inmate and certify said record to the official designated by the sending state, in order that each inmate may have the benefit of his or her record in determining and altering the disposition of said inmate in accordance with the law which may obtain in the sending state and in order that the same may be a source of information for the sending state.

(e) All inmates who may be confined in an institution pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be cared for and treated equally with such similar inmates of th receiving state as may be confined in the same institution. The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.

(f) Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state, or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subdivision, the officials of the receiving state shall act solely as agents of the sending state and no final determination shall be made in any matter except by the appropriate officials of the sending state. Costs of records made pursuant to this subdivision shall be borne by the sending state.

(g) Any inmate confined pursuant to this compact shall be released within the territory of the sending state unless the inmate, and the sending and receiving states, shall agree upon release in some other place. The sending state shall bear the cost of such return to its territory.

(h) Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed in account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state.

(i) The parent, guardian, trustee, or other person or persons entitled under the laws of the sending state to act for, advise, or otherwise function with respect to any inmate shall not be deprived of or restricted in his exercise of any power in respect of any inmate confined pursuant to the terms of this compact.

Article 5. Acts Not Reviewable in Receiving State; Extradition

(a) Any decision of the sending state in respect of any matter over which it retains jurisdiction pursuant to this compact shall be conclusive upon and not reviewable within the receiving state, but if at the time the sending state seeks to remove an inmate from an institution in the receiving state there is pending against the inmate within such state any criminal charge or if the inmate is suspected of having committed within such state a criminal offense, the inmate shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment or detention for such offense. The duly accredited officers of the sending state shall be permitted to transport inmates pursuant to this compact through any and all states party to this compact without interference.

(b) An inmate who escapes from an institution in which he is confined pursuant to this compact shall be deemed a fugitive from the sending state and from the state in which the institution is situated. In the case of an escape to a jurisdiction other

than the sending or receiving state, the responsibility for institution of extradition proceedings shall be that of the sending state, but nothing contained herein shall be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.

Article 6. Federal Aid

Any state party to this compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this compact or any contract pursuant hereto and any inmate in a receiving state pursuant to this compact may participate in any such federally aided program or activity for which the sending and receiving states have had contractual provision; provided that if such program or activity is not part of the customary correctional regimen the express consent of the appropriate official of the sending state shall be required therefor.

Article 7. Entry Into Force

This compact shall enter into force and become effective and binding upon the states so acting when it has been enacted into law by any two contiguous states from among the states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nebraska, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. For the purposes of this article, Alaska and Hawaii shall be deemed contiguous to each other; to any and all of the states of California, Oregon and Washington; and to Guam. Thereafter, this compact shall enter into force and become effective and binding as to any other of said states, or any other state contiguous to at least one party state upon similar action by such state. Guam may become party to this compact by taking action similar to that provided for joinder by any other eligible party state and upon the consent of Congress to such joinder. For the purposes of this article, Guam shall be deemed contiguous to Alaska, Hawaii, California, Oregon and Washington.

Article 8. Withdrawal and Termination

This compact shall continue in force and remain binding upon a party state until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other party states. An actual withdrawal shall not take effect until two years after the notices provided in said statute have been sent. Such withdrawal shall not relieve the withdrawing state from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, such inmates as it may have confined pursuant to the provisions of this compact.

SOCAL SERVICES

Article 9. Other Arrangements Unaffected

Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the confinement, rehabilitation or treatment of inmates nor to repeal any other laws of a party state authorizing the making of cooperative institutional arrangements.

Article 10. Construction and Severability

The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, sentence, or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. [L 1965, c 118, § 1; Supp, § 83E-1]

§ 355-2 Commitment or transfer of inmate. Any court or other agency or officer of the State having power to commit or transfer an inmate (as defined in Article 2(d) of the Western Interstate Corrections Compact) to any institution for confinement may commit or transfer the inmate to any institution within or without the State if the State has entered into a contract or contracts for the confinement of inmates in the institution pursuant to Article 3 of the Western Interstate Corrections Compact. [L 1965, c 118, § 2; Supp, § 83E-2]

§ 355-3 Enforcement. The courts, departments, agencies, and officers of the State of Hawaii and its subdivisions shall enforce this compact and shall do all things appropriate to the effectuation of its purposes and intent which may be within their respective jurisdictions including but not limited to the making and submission of such reports as are required by the compact. [L 1965, c 118, § 3; Supp, § 83E-3]

§ 355-4 Hearing. The director of social services and his authorized subordinates and agents shall hold such hearings as may be requested by any other party state pursuant to Article 4(f) of the Western Interstate Corrections Compact. [L 1965, c 118, § 4; Supp, § 83E-4]

§ 355-5 Contracts. The director of social services may enter into such contracts on behalf of the State of Hawaii as may be appropriate to implement the participation of the State in the Western Interstate Corrections Compact pursuant to Article 3 thereof. No such contract shall be of any force or effect until approved by the governor and comptroller. [L 1965, c 118, § 5; Supp, § 83E-5]

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 76-0286

DELBERT KAAHANUI WAKINEKONA,
Plaintiff,

v.

NELSON K. DOI, ANDREW I.T. CHANG, ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, LINTON LEON, and EDWIN SHIMODA,
Defendants.

FILED IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
October 6, 1976

at 2 o'clock and 8 min. p.m.
WALTER A.Y.H. CHINN, CLERK
by Leslie L. Tau'a (Deputy)

FIRST AMENDED COMPLAINT

EXHIBITS "A," "B," "C" AND "D"

DEMAND FOR JURY TRIAL

CLAYTON C. IKEI
Suite 513—116 S. King Street
Honolulu, Hawaii 96813
Telephone: 533-3777
Attorney for Plaintiff

CERTIFICATE OF SERVICE ATTACHED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 76-0286

DELBERT KAAHANUI WAKINEKONA,
Plaintiff,

v.

NELSON K. DOI, ANDREW I.T. CHANG, ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, LINTON LEON, and EDWIN SHIMODA,
Defendants.

FIRST AMENDED COMPLAINT

I.

INTRODUCTION

1. This is an action brought by the Plaintiff above-named against certain State officials and employees, who did cause and/or conduct a hearing to be held whereby the Plaintiff was transferred from the Hawaii State Prison to a California penal institution known as Folsom State Prison. The action complained of herein is that the named defendants, under color of State law, did willfully, maliciously and recklessly cause and/or conduct the aforesaid hearing in such a manner so as to deny the Plaintiff his constitutional rights as provided in the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and did further violate certain Hawaii State laws, state regulations and Article I, Section 4 and 9 of the Hawaii State Constitution.

II.

JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331, 28 U.S. § 1343[3]. Plaintiff's right of action is based on 42 U.S.C. § 1983.

III.

PARTIES

3. Defendant NELSON K. DOI is an elected Lieutenant Governor of the State of Hawaii, by delegation of authority of the Governor of the State of Hawaii is generally supervising the management of Hawaii State Prison, and is an announced candidate for the office of Mayor of the City and County of Honolulu, State of Hawaii.

4. Defendant ANDREW I.T. CHANG is the appointed director of the Department of Social Services and Housing, State of Hawaii, and is responsible by statute for the supervision of the Hawaii State Prison.

5. Defendant ANTONE OLIM is the administrator of the Hawaii State Prison.

6. Defendants EDITH M. WILHELM, JOHN SMYTHE, LINTON LEON, and EDWIN SHIMODA are all employees of the Hawaii State Department of Social Services and Housing and did directly commit the actions complained of herein.

7. That the action complained of herein which were committed by the defendants WILHELM, SMYTHE, LEON, and SHIMODA were committed pursuant to the authority granted to said defendants by defendants, DOI, CHANG and OLIM and which were ratified by the defendants DOI, CHANG and OLIM and hence are their responsibility under the doctrine of Respondeat Superior.

IV.

FACTUAL ALLEGATIONS

8. That at all times mentioned herein, the Plaintiff was in the custody of the Corrections Division of the Hawaii State Department of Social Services and Housing being an inmate of the Hawaii State Prison confined to the maximum control unit therein.

9. That on August 2, 1976, the Plaintiff DELBERT KAAHANUI WAKINEKONA appeared before a board designated as a Program Committee of the Hawaii State Prison which included the defendants WILHELM, SMYTHE, LEON and SHIMODA for a hearing whose stated purpose was that of determining the reason for which the programs at the maximum control unit of the Hawaii State Prison had failed.

10. That on August 5, 1976, the Plaintiff was served with the written notice that he would have a further hearing to determine his program designation at Hawaii State Prison, which included a possible transfer to an out-of-state penal facility and that on said date Plaintiff was transferred to the correctional facility known as Halawa Correctional Facility.

11. That on August 10, 1976, a hearing was held on Plaintiff's program classification at Hawaii State Prison; that on August 11, 1976, the committee which consisted of the defendants WILHELM, SMYTHE, LEON and SHIMODA and which conducted the aforesaid hearing rendered its decision and a written copy thereof was served on Plaintiff on August 12, 1976.

12. That the decision of the aforementioned committee was that the Plaintiff should be transferred to a mainland facility. (See Exhibit "A," a xeroxed copy of said decision.)

13. That on August 13, 1976, the Plaintiff was transferred to the California correctional facility known as Folsom State Prison.

V.

FIRST CLAIM FOR RELIEF

14. That the decision of the defendants WILHELM, SMYTHE, LEON and SHIMODA was a malicious and willful violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I Section 4 of the Hawaii State Constitution in that it was rendered by a board the composition of which was biased and

prejudicial against the Plaintiff and consisted of persons who were directly responsible for the initiation of said hearing which rendered the decision and whose specific intent and purpose was that of effectuating said transfer.

VI.

SECOND CLAIM FOR RELIEF

15. That the hearings on August 2, 1976 and August 10, 1976 were governed by state regulations promulgated and issued by the Corrections Division, Hawaii State Department of Social Services and Housing (see Exhibit "B," a xerox copy of said regulations attached hereto and incorporated herein).

16. That the transfer of the Plaintiff to the California State penal facility known as Folsom State Prison and the subsequent confinement of the Plaintiff in the "hole" at said facility was inconsistent hearing of August 10, 1976 as set forth in the aforesaid state regulations in that it was clearly punitive in design, purpose and intent, as is more fully shown by Exhibit "C" and "D," which are xerox copies of correspondence to Plaintiff's undersigned counsel and an attachment thereto.

VII.

THIRD CLAIM FOR RELIEF

17. That the actions taken by the defendants were a malicious and willful violation of state law, namely Chapter 353, Hawaii Revised Statutes.

WHEREFORE, the Appellant prays that this Honorable Court grant the following relief:

1. That a judgment issue declaring the actions complained of herein violate the Fifth, Eighth and Fourteenth Amendments of the United States Constitution, Article I, Section 4 and 9 of the Hawaii State Constitution, Chapter 353, Hawaii Revised Statutes and applicable state regulations.

2. That general damages be granted the Plaintiff against each of the named defendants, individually, in the sum of TEN THOUSAND DOLLARS ($10,000.00);

3. That punitive damages be granted the Plaintiff against each of the named defendants, individually, in the sum of TEN THOUSAND DOLLARS ($10,000.00);

4. Such further and other relief as this Court deems proper and appropriate.

DATED: Honolulu, Hawaii, September 16, 1976.

/s/ Clayton C. Ikei
CLAYTON C. IKEI
Attorney for Plaintiff

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
Corrections Division

WAKINEKONA, Delbert K. — Name
576-42-7068 — Number

NOTICE OF PROGRAMMING

August 5, 1976 — Date
Time

You are herein informed that your correctional program is scheduled to be reviewed, evaluated, or established by the program committee/diagnostic team and you are to be present at HCF, 9:00 a.m. on the 10th of August 1976.

Reason for meeting:

To determine whether your classification within the Corrections Division should be changed. The Committee will consider your entire file, your changing needs, resources and facilities available to the Corrections Division, security of State facilities and personnel, and needs of the Other inmates. The Committee will consider whether you should remain at HSP, be transferred to another Hawaii facility or be transferred to a mainland state or Federal institution.

/s/ Edith M. Wilhelm
EDITH M. WILHELM
Administrator

Receipt of notice: Date: _____ Signature: _____
(Resident)

Received notice of hearing on 8/5/76 at 1:57 p.m. J. Smythe

Results of meeting: (Summary) The Program Committee, having reviewed your entire file, your testimony and arguments by your counsel, concluded that your control classification remains at Maximum. You are still considered a security risk in view of your escapes and subsequent convictions for serious

felonies. The Committee noted the progress you made in vocational training and your expressed desire to continue in this endeavor. However your relationship with staff, who reported that you threaten and intimidate them, raises grave concerns regarding your potential for further disruptive and violent behavior. Since there is no other Maximum security prison in Hawaii which can offer you the correctional programs you require and you cannot remain at MCU because of impending construction of a new facility, the Program Committee recommends your transfer to an institution on the mainland.

/s/ Edith M. Wilhelm 8/11/76
EDITH M. WILHELM
Program Commiittee Chairman

Receipt of results: Date: _____ Signature _____
(Resident)

Program Committee's recommendation is sustained.

/s/ Antone Olim
ANTONE OLIM
August 11, 1976

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
STATE OF HAWAII

SUPPLEMENTARY RULES AND REGULATIONS
OF THE CORRECTIONS DIVISION

I

PROLOGUE

The following supplementary rules and regulations shall govern inmate/ward correspondence and the adjustment and classification processes within the Corrections Division of the State of Hawaii Department of Social Services and Housing. All prior Rules and Regulations governing the identical subject matters are null and void to the extent that they are inconsistent with these regulations.

II

CORRESPONDENCE

1. *INTRODUCTION:*

   Inmates/wards shall be afforded the privilege to send and receive letters to and from correspondents approved by the facility administrator.

2. *PRIVILEGED MAIL:*

   Privileged mail is that which is sealed and marked on the envelope as "confidential" and which may be inspected only for contraband in the presence of the inmate/ward. Letters to the Ombudsman may not be opened, but may be felt for contraband.

   a. Each inmate/ward may correspond via privileged mail with the following:

      1) the inmate/ward's sentencing judge;

      2) the inmate/ward's previously identified personal attorney;

      3) the Hawaii State Ombudsman;

4) the Governor of the State of Hawaii;

5) the Attorney General (State or Federal);

6) the Director, Department of Social Services and Housing;

7) the Corrections division Administrator;

8) the State of Hawaii Board of Paroles and Pardons;

9) the Facility Administrator; and

10) elected State of Hawaii officials.

b. Those inmate/wards committed under jurisdictions other than the State of Hawaii may, in addition, correspond, via privileged mail, with the following:

1) Chief executive of the foreign jurisdiction; and

2) Director of the department in foreign jurisdiction to which committed.

3. *INSPECTION:*

Incoming or outgoing mail to and from inmates/wards may be inspected and/or read pursuant to the following guidelines.

a. *Contraband.*

A facility administrator or a designated representative may inspect all incoming and outgoing mail to and from inmates/wards for the presence of contraband contained therein.

b. *Reading.*

The facility administrator or his designated representative may reject the mailing or receipt of letters pursuant to the following guidelines.

1) *Outgoing letters.* Outgoing letters from inmates/wards may be disapproved for mailing if the letter

is to a person who is not an approved correspondent or, upon reading, the letter concerns or contains any of the following:

(a) threats of physical harm against any person or threats of criminal activity;

(b) threats of blackmail or extortion;

(c) plans to send contraband in or out of the facility;

(d) plans to escape;

(e) plans for activities in violation of institutional rules;

(f) plans for criminal activity;

(g) is in code and its contents are not understood by the reader;

(h) solicits gifts of goods or money except as authorized.

(i) information which, if communicated, would create a clear and present danger of violence and/or physical harm to a human being;

(j) material which violates postal regulations; and/or

(k) conducting an inmate's/ward's business through the mails except as authorized.

2) 2) *Incoming letters.* Incoming letters to inmates/wards may be disapproved for receipt only: for the reasons set forth in 3b(1) above; if the letter contains material which would cause psychiatric or emotional disturbance to the inmate/ward; or if the letter is from a person who is not an approved correspondent and special permission for the letter has not been obtained.

3) *Limitations.* Disapproval of a letter on the basis that it would cause psychiatric or emotional disturbance to the inmate/ward may be done only by the facility administrator in consultation with a member of the facility's mental health or counseling staff. The letter may be disapproved only upon a finding that receipt of the letter would be likely to affect a prison discipline or security or the inmate's/ward's rehabilitation, and that there is no reasonable alternative means of ameliorating the disturbance to the inmate/ward. Outgoing or incoming letters may not be rejected solely upon the ground that they contain criticism of the institution or its personnel.

4) *Notice of Disapproval of Inmate Mail.*

(a) When an inmate/ward is probibited from sending a letter, the letter and a written and signed notice stating the reason(s) for disapproval and indicating the portions of the letter causing disapproval shall be given the inmate/ward.

(b) When an inmate/ward is prohibited from receiving a letter, the letter and a written and signed notice stating the reason(s) for disapproval and indicating the portion or portions of the letter causing disapproval will be given the sender. The inmate will be given notice in writing that a letter has been rejected, indicating the reason(s) and the sender's name.

(b) Copies of material from an inmate's/ward's correspondence which reveals evidence of past rule violations or contains any of the information set forth above in paragraph 3b(1) above may be placed in his file. He shall be notified in writing of the placing of any such material in his file.

5) *Use of English Language.* All letters should be written in English, but every effort should be made to accommodate those inmates/wards who are unable to write in English or whose correspondence would be unable to understand a letter written in English. The criminal sophistication of the inmate/ward and the relationship of the inmate/ward and the correspondent are factors to be considered in deciding whether correspondence in a foreign language should be permitted.

c. *Censorship.*

A facility administrator or a designated respresentative may censor incoming or outgoing mail to or from inmates/wards, subject to the following two criteria. First, censorship must further a substantial governmental interest, such as maintaining the security and order of the facility, rehabilitating the inmate/ward, or ensuring safety of facility personnel, residents, and/or the general community. Second, the facility will censor no more of the letter than necessary or essential to achieve the particular governmental interest. Thus, for example, plans for criminal activities, escape, movement of contraband, and the like may be censored, but not other unobjectionable material unrelated to the particular governmental interest. Copies of the censored material shall be placed in the inmate's/ward's file. He shall be notified in writing of the placing of any such material in his file.

III

THE ADJUSTMENT PROCESS

1. *GENERAL:*

The Adjustment process tailors punishment for specific rule violations to the individual's training and treatment needs while maintaining facility order and ensuring respect for rules and the rights of others.

a. *Minor Misconduct.* A minor rule violation is defined as that which poses no threat to the safety, security, or welfare of the staff, other inmates/wards, or the institution and/or subjects the individual to the imposition of lesser penalties, such as a reprimand or the mere loss of privileges. Such misconduct may be punished by a disciplinary hearing officer designated by the facility administrator who was not actively involved in the process by which the inmate/ward was brought before him. The disciplinary hearing officer shall inform the inmate/ward that he committed a minor infraction, to which the individual must be given a brief opportunity to respond, to offer an explanation or defense on his behalf, or otherwise show that he is not deserving of disciplinary action. The disciplinary hearing officer shall thereafter prepare a brief written report to be given to the individual and placed in his file, indicating the infraction, the sanction, and the date(s) the sanction is to be or was carried out.

b. *Serious Misconduct.* A serious rule violation is defined as that which poses a threat to the safety, security, or welfare of the staff, other inmates/wards, or the institution and/or subjects the individual to the imposition of serious penalties, such as segregation. Such misconduct will be punished through the Adjustment Committee pursuant to the procedures set forth below.

2. *COMPOSITION:*

The facility administrator shall establish an impartial Adjustment Committee composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee. The facility administrator shall not sit as a member of the Committee. The Adjustment Committee has the power to punish for misconduct.

3. *PROCEDURE:*

a. *Pre-hearing detention.* An inmate/ward should not be detained pending an Adjustment Committee hearing longer than three working days; provided, however, if, in the judgment of the facility administrator, conditions exist which require longer detention, he may be so detained for a reasonable time. The guidelines set forth for emergency detention should be followed.

b. *Pre-hearing investigation.* A staff member should conduct a complete investigation into the facts of the alleged misconduct to determine if there is probable cause to believe the inmate/ward committed misconduct. If he determines probable cause exists, the following procedures shall be initiated.

c. *Notice.* The inmate/ward has the right to prior notice that an Adjustment Committee hearing will be held against him.

(1) Within a reasonable time, not less than 24 hours prior to the hearing, the charged inmate/ward shall be served with written notice of the time and place of the Adjustment Committee hearing and what the specific charges, including a brief statement of the facts, are against him. If the inmate/ward waives the 24 hour period, it shall be reduced to writing and signed by the inmate/ward on the face of the notice.

(2) The inmate/ward and/or his counsel substitute (as described below) shall have the opportunity to review all relevant non-confidential reports of misconduct or a summary of the details thereof during the period between the notice and the hearing.

(3) The misconduct report or summary should briefly contain the following: the specific rule violated; the facts supporting the charge; any unusual

inmate/ward behavior; any staff or inmate/ward witnesses; the disposition of any physical evidence (e.g., weapons); and any immediate action taken.

d. *Hearing*. The inmate/ward has a right to appear at the Adjustment Committee hearing, except where institutional safety would be jeopardized. Exclusion of the individual from the hearing shall occur only in exceptional circumstances and shall be well documented. If the inmate/ward declines to attend the hearing, it shall be held regardless of his absence.

(1) The Committee shall explain the reason for the hearing and the nature of the charge(s) against the inmate/ward. The inmate/ward shall plead guilty or not guilty to the charges. Failure to plead shall be accepted as a plea of not guilty.

(a) A plea of guilty eliminates the need to present evidence against the inmate/ward who will then be given an opportunity to explain his actions and/or offer evidence in mitigation.

(b) A plea of not guilty necessitates the presentation of evidence against the inmate/ward.

(2) Evidence, such as testimony and reports, shall be presented to the Committee in the presence of the charged inmate/ward. The inmate/ward should be advised that he has a right to remain silent, but that his silence may be used as a permissable inference of guilt.

(3) *Confrontation and cross-examination:*

(a) The inmate/ward may be given the privilege to confront and cross-examine adverse witnesses.

(b) However, the Committee may deny confrontation and cross-examination and identification of adverse witnesses if in its adjustment to do so would:

(i) subject the witnesses to potential reprisal;

(ii) jeopardize the security and/or good government of the facility; or

(iii) be otherwise unduly hazardous to the facility's safety or correctional goals.

(c) If confrontation and cross-examination and identification of adverse witnesses are denied, the Committee may, but is not required to, enter in the record of the proceeding and make available to the inmate/ward an explanation for the denial. Additionally, the inmate/ward shall be given an oral or written summary of the testimony against him and provided an opportunity to respond.

(4) *Opportunity to be heard:* The inmate/ward shall be given an opportunity to respond to any and all evidence against him, explain his alleged misconduct, and/or offer evidence of mitigation.

(a) He should be permitted to call witnesses and present evidence in his defense so long as it will not be unduly hazardous to institutional safety or correctional goals.

(b) The Committee may deny the inmate's/ward's calling of certain witnesses or presentation of certain evidence for reasons such as: irrelevance; lack of necessity; the hazards presented in individual cases; or any other justifiable reason. In this regard,

the Committee retains the the discretion to keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate/ward to be heard. The Committee is encouraged, but is not required, to state the reason(s) for the refusal.

(5) *Counsel substitute:* No inmate/ward shall be represented by an attorney at the Adjustment Committee hearing. He will be permitted to employ counsel-substitute. Counsel-substitute shall constitute a member of the facility staff who did not actively participate in the process by which the individual was brought before the Committee or, in the facility administrator's discretion, a sufficiently competent inmate designated by the facility staff.

e. *Findings.* The inmate/ward has a right to be apprised of the findings of the Adjustment Committee.

(1) Upon completion of the hearing, the Committee may take the matter under advisement and will render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond to any evidence which may be subsequently come to light after the formal hearing. The inmate/ward's silence may be used as a permissable inference of guilt, although disciplinary action must be based upon more than his mere silence. Disciplinary action may only be rendered where:

(a) the inmate/ward admits the violation or pleads guilty;

(b) the charge is supported by substantial evidence; and/or

(c) there is reasonable cause to believe that the inmate's/ward's behavior has constituted a danger to person, property, security, or the orderly operation of the facility.

(2) The inmate/ward shall be given a brief summary of the Committee's findings within a reasonable period of time after the hearing, which findings shall be entered in his file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason(s) therefore must be set forth in the findings.

f. *Punishment.* The Adjustment Committee has the power to render sanctions commensurate with the gravity of the rule and the severity of the violation. Corporal punishment is prohibited provided, however, that physical force may be employed for self-defense or defense of others, to maintain the immediate order and security of the prison, to remove an inmate pursuant to a lawful order, or any other reason demanded by the exigencies of institutional safety and correctional goals. The following types of punishment may be rendered by the Adjustment Committee:

(1) temporary or permanent loss of privileges;

(2) segregation or confinement not longer than 60 days provided, however, that a longer period may be imposed with the express written approval of the Corrections Division Administration; and

(3) any other punishment deemed necessary by the Adjustment Committee.

The Committee may also refer the matter to the Prison Program Committee for further action.

4. *REVIEW:*

Each inmate/ward has the right to seek administrative review of the decision of the disciplinary hearing officer or adjustment committee through the grievance process. Review shall be initiated within fourteen calendar days of receipt of the Committee's decision.

IV

THE CLASSIFICATION PROCESS

1. *GENERAL:*

An inmate's/ward's classification determines where he is best situated within the Corrections Division. Rather than being concerned with isolated aspects of the individual or punishment (as is the adjustment process), classification is a dynamic process which considers the individual, his history, his changing needs, the resources and facilities available to the Corrections Division, the other inmates/wards, the exigencies of the community, and any other relevant factors. It never inflicts punishment; on the contrary, even the imposition of a stricter classification is intended to be in the best interests of the individual, the State, and the community. In short, classification is a continuing evaluation of each individual to ensure that he is given the optimum placement within the Corrections Division.

2. *COMPOSITION:*

The facility administrator shall establish an impartial Program Committee composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee. The facility administrator shall not sit as a member of the Committee.

3. *PROCEDURE:*

So long as a transfer involves a grevious loss to the inmate/ward, the following procedures adhere. Grievous loss is generally defined as a serious loss to a reasonable man. Thus, transfer from Hawaii State Prison to Kulani Honor Camp would normally not cause a grievous loss.

a. *Pre-hearing detention.* An inmate/ward should not be detained pending hearing longer than four working days, except where emergency conditions require a longer period of detention which shall be a reasonable time.

b. *Notice.* The inmate/ward has the right to prior notice that a Program Committee hearing will be held involving him.

(1) Within a reasonable time, not less than 24 hours prior to the hearing, the inmate/ward shall be served with written notice of the time and place of the Program Committee hearing and what the Committee will consider at the hearing. The notice should briefly state what the classification process involves, that it considers everything in his file, and any recent specific facts which may weigh significantly in the classification process. If the inmate/ward waives the 24 hour period, it shall be reduced to writing and signed by the inmate/ward on the face of the notice.

(2) The inmate/ward and/or his counsel substitute (as described below) shall have the opportunity to review all relevant nonconfidential information, that may be considered by the Committee, during the period between the notice and the hearing.

c. *Hearing.* The inmate/ward has a right to appear during the Program Committee hearing if a change, modification, or transfer is planned which would result

in a grievous loss. If the inmate/ward declines to attend the hearing, it shall be held regardless of his absence.

(1) The Committee shall explain the nature of the classification process and generally what the Committee is considering at the hearing.

(2) Evidence shall be presented to the Committee in the presence of the inmate/ward. The inmate/ward should be advised that he has a right to remain silent, but that his silence may be used as a permissible inference of evidence against him.

(3) *Confrontation and cross-examination*:

(a) The inmate/ward may be given the privilege to confront and cross-examine adverse witnesses.

(b) However, the Committee may deny confrontation and cross-examination and identification of adverse witnesses if in its judgment to do so would:

(i) subject the witness(es) to potential reprisal;

(ii) jeopardize the security and/or good government of the facility; or

(iii) be otherwise unduly hazardous to the facility's safety or correctional goals.

(c) If confrontation and cross-examination and identification of adverse witnesses are denied, the Committee may, but is not required to, enter in the record of the proceeding and make available to the inmate/ward an explanation for the denial. Additionally, the inmate/ward shall be given an oral or written summary of the testimony against him and provided an opportunity to respond.

(4) *Opportunity to be heard*: The inmate/ward shall be given an opportunity to respond to any and all evidence and offer evidence on his behalf.

(a) He should be permitted to call witnesses and present evidence on his behalf so long as it will not be unduly hazardous to institutional safety or correctional goals.

(b) The Committee may deny the inmate's/ward's calling of certain witnesses or presentation of certain evidence for reasons such as: irrelevance; lack of necessity; the hazards presented in individual cases; or any other justifiable reason. In this regard, the Committee retains the discretion to keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate/ward to be heard. The Committee is encouraged, but is not required, to state the reason(s) for the refusal.

(5) *Counsel substitute*: No inmate/ward shall be represented by an attorney at the Program Committee hearing. He will be permitted to employ counsel-substitute which shall constitute a member of the facility staff who did not actively participate in the process by which the individual was brought before the Committee or, in the facility administrator's discretion, a sufficiently competent inmate designated by the facility staff.

d. *Findings*. The inmate/ward has a right to be apprised of the findings of the Program Committee.

(1) Upon completion of the hearing, the Committee may take the matter under advisement and will render a recommendation based only upon evidence presented at the hearing to which the indi-

vidual had an opportunity to respond or any evidence which may subsequently come to light after the formal hearing. The inmate/ward's silence may be used as a permissible inference of evidence against him, although reprogramming must be based upon more than his mere silence.

(2) The inmate/ward shall be given a brief written summary of the Committee's findings within a reasonable period of time after the hearing, which findings shall be entered in his file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason(s) therefore must be set forth in the findings.

(3) The facility administrator will, within a reasonable period of time, review the Program Committee's recommendation. He may, as the final decisionmaker:

(a) Affirm or reverse, in whole or part, the recommendation; or

(b) hold in abeyance any action he believes jeopardizes the safety, security, or welfare of the staff, inmate/ward, other inmates/wards, institution, or community and refer the matter back to the Program Committee for further study and recommendation.

4. *REVIEW:*

Each inmate/ward has the right to seek administrative review of the decision through the grievance process. Review shall be initiated within fourteen calendar days of receipt of the final decision.

V

LEGAL COUNSEL

Notwithstanding the foregoing Supplementary Rules and Regulations, an inmate/ward may retain legal counsel only in the following specific situations:

1. Classification Process:
   a. For a potential Interstate transfer.
   b. For a potential transfer to an increased security classification longer than 30 days.
2. Adjustment Process:
   a. For a potential segregated punishment longer than 30 days.
   b. For any rule violation which also constitutes a criminal felony.

Effective date: These supplementary rules and regulations shall become effective ten days after filing in the Office of the Lieutenant Governor of the State of Hawaii.

Adopted:

/s/ Andrew I.T. Chang
ANDREW I.T. CHANG
Director, Department of Social Services and Housing.

APPROVED AS TO FORM:

/s/ Michael A. Lilly
MICHAEL A. LILLY
Deputy Attorney General

Date: June 10, 1976

APPROVED:

/s/ George R. Ariyoshi
GEORGE R. ARIYOSHI
Governor, State of Hawaii

Date: June 15, 1976

EXHIBIT C

Name: D. Wakinekona B-75902X
Box No.: Reprisa, California
Date: August 16, 19__

Gil & Clayton

This is just a short note to let you, both know I'm at Folsom Prison, and right at this moment I'm in th hole!!! I just got through facing a committee a few minutes ago to see if I should go to the main yard, but there decision (wrong) was that I should remain in the hole just as I was back there in Hawaii, except in here we take a bath on Wensdays and Sunday, what system this place has, so far no programs and Hawaii say's that I'll have so

All it seems to me that I was taken out of one hole or unit and put into another one!! a bigger one though.

I hope something can be done so cause I miss Haw and my family!!

In this letter is a peice of paper which I was given on the night I arrived, it seems Hawaii made me out to be a bad guy. Maybe I'm wrong. ren isn't here with me he must be at San Quenten

Delbert

P.S.
When writing to me use may name and new number as you see it on the envelope or else I won't get the mail.

P.S.S. Send me stamps

EXHIBIT D

NAME and NUMBER WAKINEKONA B-75902X CELL: SHU 23

above named inmate arrived this date from Hawaii prison system. Placed in the Security Housing unit pursuant to memo from J. Osmpoy, AWC, which reads as follows: "On Friday August 13th at approximately 8:00 pm inmate Kakinelsona will arrive at Folsom vin CDC transportation./This inmate is from the Hawaii prison system and will be on safekeeper status at Folsom. He has been convicted of murder 1st and is serving a sentence of life without possibiliyt of parole and, for two counts of armed robbery. This inmate is on lockup status in the Hawaii prison system. He has a background of aggravated battery and has a history of escape from prison. He is considered to be the most dangerous and assaultive inmate in the Hawaii prison system. He is to be kept separated from inmate Kashanni, who should arrive tomorrow, also from the Hawaii system, as much as possible. . . ."

IG: Central File via H. Morphis, AWC/t
CO Mr. Petrocci
AWC File
Inmate/Undersigned
August 13, 1976

/s/ F. J. Gaul, Lieutenant
F. J. GAUL
3rd Watch

CLASS. and SOC. SERV.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 76-0286

DELBERT KAAHANUI WAKINEKONA,
Plaintiff,

v.

NELSON K. DOI, ANDREW I.T. CHANG, ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, LINTON LEON, and EDWIN SHIMODA,
Defendants.

DEMAND FOR JURY TRIAL

The Plaintiff hereby demands a trial by jury on all issues so triable herein.

DATED: Honolulu, Hawaii, September 16, 1976.

/s/ Clayton C. Ikei
CLAYTON C. IKEI
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he delivered upon MICHAEL A. LILLY, ESQ., Attorney for Defendants, at his last known address, the enclosed documents on October 6, 1976.

/s/ Clayton C. Ikei
CLAYTON C. IKEI
Attorney for Plaintiff

Office - Supreme Court, U.S.
FILED
SEP 23 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1581

ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, WINTON LEONG, AND EDWIN SHIMODA,

Petitioners,

vs.

DELBERT KAAHANUI WAKINEKONA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

Robert Gilbert Johnston
315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

Attorney for Respondent

OF COUNSEL
Clayton C. Ikei
Janice Metros Johnston

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TABLE OF CONTENTS

Page

Questions Presented 1

Table of Authorities ii

Statement of the Case 2

Summary of Argument 2-3

Argument

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT MUST BE AFFIRMED BECAUSE THE INVOLUNTARY TRANSFER OF A HAWAII STATE PRISONER TO A MAINLAND PRISON IMPLICATED A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT 3

I. RESPONDENT HAD A REASONABLE EXPECTATION BASED ON THE STATE REGULATORY SCHEME AND PRACTICE THAT HE WOULD NOT BE TRANSFERRED TO A MAINLAND PRISON WITHOUT GOOD CAUSE 4

II. INDEPENDENT OF THE STATE REGULATORY SCHEME AND PRACTICE, RESPONDENT RETAINED A RESIDUUM OF LIBERTY THAT WOULD BE INFRINGED BY A TRANSFER TO A MAINLAND PRISON WITHOUT COMPLYING WITH THE MINIMUM REQUIREMENTS OF DUE PROCESS 11

Conclusion 15

TABLE OF AUTHORITIES

Page

Cases:

Adams v. Saenger, 303 U.S. 59 (1938) 9

Appleby v. New York, 271 U.S. 364 (1925) 9

Brown v. Louisiana, 383 U.S. 131 (1966) 9

Cooper v. Telfair, 4 Dall. 14 (1800) 13

Crowell v. Benson, 285 U.S. 22 (1932) 8

Evans v. Newton, 382 U.S. 296 (1966) 9

Fong Tue Ting v. United States, 149 U.S. 698 (1893) 13

Greenholtz v. Nebraska Penal Inmates, 422 U.S. 1 (1979) ..4,8,9

Irving Trust v. Day, 314 U.S. 566 (1942) 8-9

Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 588 F.2d 1216 (9th Cir. 1978) 13

Logan v. Zimmerman Brush Co., _____ U.S. _____, 102 S.Ct. 1148 (1982) 9,10

Lono v. Ariyoshi, 63 Haw. 138, 621 P.2d 976 (1981) 8

Meachum v. Fano, 427 U.S. 215 (1976) 3,4

Montanye v. Haymes, 427 U.S. 236 (1976) 4,10

Municipal Investors v. Birmingham, 316 U.S. 153 (1942) 9

Perry v. Sinderman, 408 U.S. 593 (1972) 4,5

Tai v. Thompson, 387 F. Supp. 912 (D.C. Haw. 1975) 8

Vitek v. Jones, 445 U.S. 480 (1980) ..... *passim*

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951) 9

Wolff v. McDonnell, 418 U.S. 539 (1974) 4,5,8

CONSTITUTION:

United States Constitution: Fourteenth Amendment 3

STATUTES:

Hawaii Revised Statutes c. 91-3 5

RULES AND REGULATIONS:

Rules III, IV, and V, Supplemental Rules and Regulations of the Corrections Division of the State of Hawaii ..... *passim*

Other

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QUESTIONS PRESENTED

1. Whether the Supplementary Rules and Regulations of the Corrections Division of the State of Hawaii create a reasonable expectation that a prisoner will not be transferred from the Hawaii prison system to a Mainland prison absent good cause for the transfer.

2. Whether the transfer of a prisoner from the Hawaii prison system to a Mainland prison involves a substantial change in conditions of confinement not justified by the sentence absent good cause for the transfer.

STATEMENT OF THE CASE

Respondent Wakinekona was sentenced to life imprisonment without the possibility of parole. He was confined to Hawaii State Prison (HSP). A prison program committee recommended on August 1973 that Respondent's sentence be reduced. (R. 441) A prison evaluation in January 1974 found Respondent's conduct during the preceding three years to be exemplary. (R. 441) Nevertheless, on August 13, 1976, Respondent was transferred to Folsom State Prison in California. The prison transfer papers identified Respondent as dangerous and assaultive. (J.A. 27)

Respondent, who had filed suit to restrain his transfer, pressed his claim in the United States District Court for the District of Hawaii under 42 U.S.C. section 1983 against the state officials who caused his transfer. He alleged he was transferred in violation of due process of law. He claimed that the committee that decided to transfer him was not neutral. He alleged that members of the committee were biased and prejudiced against him. (J.A. 4-5); R. 9-12, 86, 404, 444) He further alleged that the committee was composed of the same persons who had initiated the transfer proceedings, in direct violations of the Corrections Division rules and regulations. (J.A. 4-5)

The district court dismissed the amended complaint under Federal Rule of Civil Procedure 12(b)(6). It held that the transfer did not implicate a substantial liberty interest protected by due process. The Court of Appeals for the Ninth Circut reversed.

SUMMARY OF ARGUMENT

Respondent Wakinekona was transferred from Hawaii State Prison to Folsom State Prison in California. The regulatory scheme (J.A. 13-25) in effect at that time provided a detailed

procedure for making a factual finding as to what was in the best interest of the individual, the State, and the community, before transferring prisoners interstate. Corrections officials also made it a practice to provide hearings before transferring prisoners interstate. The regulatory scheme and the practice created a reasonable expectation that prisoners would not be transferred interstate without good cause. The expectation created a liberty interest that was entitled to due process protection. *Vitek v. Jones,* 455 U.S. 480, 493-94 (1980).

Aside from the regulatory scheme and practice, Respondent retained a residuum of liberty, even after his conviction and sentence. The loss of liberty caused by an interstate transfer is qualitatively different from the loss involved in an intrastate transfer. Like banishment, an interstate transfer isolates the prisoner, particularly a prisoner like Respondent. The interstate transfer of Respondent constitutes the kind of deprivation of liberty that requires procedural protections. *Vitek v. Jones,* 455 U.S. 480, 493-94 (1980).

ARGUMENT

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT MUST BE AFFIRMED BECAUSE THE INVOLUNTARY TRANSFER OF A HAWAII STATE PRISONER TO A MAINLAND PRISON IMPLICATES A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Prisoners are no longer considered slaves of the state or outcasts. *Meachum v. Fano,* 427 U.S. 215, 231 (1976) (Stevens, J., dissenting). Prisoners do not forfeit all constitutional protections on conviction and confinement. "There is no

iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974). Prisoners retain "a variety of important rights that courts must be alert to protect." *Meachum v. Fano*, 427 U.S. at 225. Among the rights a prisoner retains is a residuum liberty interest in conditions of confinement not "qualitatively different from the punishment characteristically suffered by a person convicted of a crime." *Vitek v. Jones*, 455 U.S. 480, 493 (1980). *Accord Wolff v. McDonnell*, 418 U.S. at 572 n. 19; *see generally*, Kirby, *A Case for Prisoners' Mental Health Rights – Breakthrough and Compromise*, 30 Amer. U. L. R. 765 (1980). Another is a liberty interest created by a state regulatory scheme, *Vitek v. Jones*, 455 U.S. at 487-488; *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979); *Wolff v. McDonnell*, 418 U.S. at 571-572, *Montayne v. Haymes*, 427 U.S. 236, 241 (1976), or in the absence of formal rules by an administrative practice. *Perry v. Sinderman*, 408 U.S. 593, 599-602 (1972). Whatever the source, liberty interests are protected by due process of law. *Wolff v. McDonnell*, 418 U.S. at 557, and a basic element of due process is a right to a neutral tribunal. *Vitek v. Jones*, 455 U.S. at 496.

I. RESPONDENT HAD A REASONABLE EXPECTATION BASED ON THE STATE REGULATORY SCHEME AND PRACTICE THAT HE WOULD NOT BE TRANSFERRED TO A MAINLAND PRISON WITHOUT GOOD CAUSE.

In *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979) this Court held that a state regulatory scheme created a sufficient expectancy of parole to entitle prisoners to some measure of constitutional protection. It emphasized that the expectancy resulted from the state's unique statutory structure

and language. In *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) this Court found that a state regulatory scheme created a sufficient expectancy of good time credits that could be forfeited only for misbehavior to entitle prisoners to some measure of constitutional protection. In *Vitek v. Jones*, 455 U.S. 480, 493-94 (1980) this Court ruled that a state statutory scheme created a sufficient expectancy that a prisoner would not be transferred to a mental hospital to entitle prisoners to some measure of constitutional protection.

Respondent had a reasonable expectation that he would not be transferred to a Mainland prison without good cause. The expectation was created by the state regulatory scheme. The expectation was created also by the state practice of providing hearings pursuant to the regulatory scheme to prisoners exposed to the risk of transfers. *See Perry v. Sinderman*, 408 U.S. at 599, 601, 602. Either expectation creates a liberty interest entitled to due process protection. Because the complaint was dismissed for failure to state a claim upon which relief may be granted, the Respondent was not given a full opportunity to develop the extent of the State's practice in providing hearings for prisoners exposed to the risk of transfers to the Mainland.

The regulatory scheme was adopted by the state director of the department of social services and approved by the state attorney general and the state governor. (J.A. 25) It was adopted under the Hawaii Administrative Procedures Act. *Haw. Rev. Stat.* c. 91-3. It has the effect of law. The scheme directly conditions the power of the Corrections Division to discipline and to reclassify prisoners. Whatever statutory powers the Hawaii legislature may have given the executive were tempered by the rules of the Corrections Division. The statutory power to place prisoners within the Hawaii corrections system, or without the Hawaii corrections system in a federal or another state's prison, is limited by this detailed regulatory scheme.

The regulatory scheme distinguishes between two kinds of hearings. The first is an adjustment hearing that results in punishment for specific rule violations. (Rule III, J.A. 13) The second is a classification hearing directed to placing prisoners in the corrections system with reference to the best interests of the individual, the state, and the community. (Rule IV, J.A. 20) An adjustment hearing is conducted by an adjustment committee appointed by the prison administrator; a classification hearing is conducted by a program committee established by the prison administrator. (J.A. 14 & 20) The composition of the program committee must be of at least three members who were not actively involved in the process by which the prisoner was brought before the committee. In addition the prison administrator shall not sit as a member of the program committee. The composition of the program committee assures the prisoner brought before it for possible reclassification some degree of neutrality.

Rule III dealing with adjustment hearings and Rule IV dealing with classification hearings provide for basic elements of due process. Prisoners are entitled to notice of and participation in the hearing, and to the findings and the recommendations of the committee, in all adjustment hearings and in *any* classification hearings involving a grevious loss. (J.A. 15-19 & 21-23) A grevious loss is defined as a serious loss to a reasonable man. (J.A. 21) The rules suggest that ordinarily a transfer from HSP on the island of Oahu to Kulani Honor Camp on the island of Hawaii does not involve a grevious loss. (J.A. 21) However, an interstate transfer does involve a grevious loss. This is evidenced by Rule V which identifes the four situations in which a prisoner is entitled to a lawyer. (J.A. 25) A prisoner is entitled to a lawyer only (1) at an adjustment hearing in which the prisoner (a) is charged with conduct that may constitute a felony or (b) is exposed to the risk of segregated punishment of more than thirty

days, or (2) at a classification hearing in which the prisoner is (a) exposed to an increased security classification for more than thirty days or (b) an *interstate* transfer. At all other adjustment hearings or classification hearings the prisoner is not allowed a lawyer, rather he is allowed a lawyer substitute. (J.A. 18 & 23)

Furthermore, the regulatory scheme requires a program committee to make factual findings and a recommendation. The findings of the committee on which the recommendation is based must be supported by the evidence presented to and reviewed by the committee. (J.A. 23-24) The regulatory scheme also restricts the power of the prison administrator. Although it allows the prison administrator to affirm or reverse the recommendation of the program commtitee, or to remand it to the committee for further consideration (J.A. 24), it does not allow him to change the findings. This restriction that limits the power of the prison administrator was adopted by the department of social services and approved by the state attorney general and state governor.

The regulatory scheme thus creates an expectation that prisoners will not be transferred to Mainland prisons without good cause. The classification process "never inflicts punishment" but seeks to classify prisoners "in the best interests of the individual, the State, and the system." (J.A. 20) The rules provide for a hearing only for transfers involving "a grevious loss" which is "a serious loss to a reasonable man." (J.A. 21)

A reclassification must be in the best interests of the individual, the State, and the community. The regulatory scheme clearly contemplates a fair hearing for a prisoner who is faced with the risk of a serious loss. The purpose of the hearing is to ensure that before a serious loss is inflicted on a prisoner that it is indeed in the best interests of the individual, the State, and the community. Whether this scheme requires a factual or a predictive finding, it creates an expectation that is entitled to some

constitutional protection. *See Greenholtz v. Nebraska Penal Inmates*, 442 U.S. at 12.

Respondent's transfer from Hawaii to California was a serious loss. It would be a serious loss to any reasonable man. It separates him from his family, friends and lawyers by at least two thousand miles of Pacific Ocean. (J.A. 26) It places him in an alien environment. It denies him meaningful access to the Hawaii courts and corrections agencies. It isolates him at least as much as extended segregation for punishment. *Cf. Wolff v. McDonnell*, 418 U.S. at 572 n. 19; *Tai v. Thompson*, 387 F. Supp. 912, 915 (D.C. Haw. 1975). In Respondent's case, the interstate transfer could isolate him for the rest of his life.

Any reasonable man faced with isolation for the rest of his life would think that a serious loss. And any reasonable man reading the Hawaii regulatory scheme as a whole would think the transfer of a prisoner to the Mainland was treated as a serious loss. Rule V provides that a prisoner may retain a lawyer in only four specific situations, one of which is a classification hearing for a potential interstate transfer. When a prison official tells a prisoner he is entitled to a lawyer, a reasonable prisoner believes the risk of a serious loss is involved.

Lono v. Ariyoshi, 63 Haw. 138, 621 P.2d 976 (1981), on which the Petitioners rely, is not controlling on the issue of whether Hawaii regulations create a liberty interest. The Supreme Court of Hawaii may authoritatively construe Hawai statutes and regulations, but "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Crowell v. Benson*, 285 U.S. 22, 60 (1932). In this regard this Court has made independent judgments in reviewing state court findings in cases involving the Contract Clause, *e.g. Irving Trust v. Day*, 314 U.S. 556, 561

(1942), *Appleby v. New York*, 271 U.S. 364 (1925); *Municipal Investors v. Birmingham*, 316 U.S. 153 (1942); in cases involving state created rights under the Full Faith and Credit Clause, *e.g. Adam v. Saenger*, 303 U.S. 59 (1938); in cases involving the Due Process Clause, *e.g. Brown v. Louisiana*, 383 U.S. 131 (1966); *Evans v. Newton*, 382 U.S. 296 (1966); *Logan v. Zimmerman Brush Co.*, _____ U.S. _____, 102 S.Ct. 1148 (1982); and in cases involving the Compact Clause *e.g. West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951).

Moreover, the court in *Lono* never considered, discussed, or even cited *Vitek v. Jones* or *Greenholtz v. Nebraska Penal Inmates*, although those cases had been decided. In *Lono* the court only considered, and briefly at that, one paragraph of the state's regulatory scheme. It did not consider that the scheme defines transfers in terms of a grevious loss. It did not consider the classification committee's obligation to make factual findings to support its recommendations, or the restrictions on the power of the prison administrator to change those findings. It did not discuss at all the differing consequences that flow from interstate and intrastate transfers.

In this case, however, there really is no dispute about the meaning of any regulation. The question is simply whether the regulatory scheme creates a liberty interest under the federal constitution, as the Court of Appeals recognized, that is preeminently a federal question. In *Logan v. Zimmerman Brush*, this Court reviewed an Illinois Supreme Court opinion in light of the Due Process Clause. The case arose under the Illinois Fair Employment Practices Act that prohibited discrimination against the physically handicapped. The Act required an administrative hearing before a commission within 120 days after a complaint was filed. The commission set the hearing 5 days after the limitations period expired. The Illinois court held that the Commission was without jurisdiction for failure to comply with limitations period. This Court noted that:

> The Illinois Supreme Court . . . seemed to believe that no individual entitlement could come into being under the FEPA until the Commission took appropriate action within the statutory deadline. Because the entitlement arises from statute, the court reasoned, it was the legislature's prerogative to establish the "procedures to be followed upon a charge." *Logan v. Zimmerman*, 102 S.Ct. at 1155.

The Illinois court held that no substantive right came into being unless the 120-day rule was complied with. This Court rejected that view.

> The 120-day limitation in the FEPA, . . . of course, involves no such thing. It is a procedural limitation on the claimant's ability to assert his rights, not a substantive element of the FEPA claim. Because the state scheme has deprived Logan of a property right, then we turn to the determination of what process is due to him. *Logan v. Zimmerman Brush*, 102 S.Ct. at 1156.

Thus, in *Logan* this Court decided that the Illinois statute created a property right even though the Illinois Supreme Court had held that it did not create a property right. In this case, as in *Logan*, this Court is in no way bound by the state's court's decision on the issue of whether the regulation creates an interest protected by due process.

Meachum v. Fano, 427 U.S. 215 (1976) and *Montanye v. Haymes*, 427 U.S. 236, 242 (1976), also relied on by Petitioners, are inapposite. In neither of those cases was there any regulation or practice which gave rise to a reasonable expectation that the prisoners would not be transferred from one prison to another within the same state without good cause. Hence there was no state-created liberty interest in those cases.

On the other hand, because of Hawaii's detailed regulatory scheme this case is like *Vitek v. Jones*. There this Court found that a Nebraska statute authorizing the transfer of a prisoner to a

mental institution upon a physician's or psychologist's finding that the prisoner suffered from a mental disease or defect which could not be properly treated in prison created a liberty interest in not being transferred to a mental institution, in spite of the fact that the statute clearly authorized the prison administrator "to designate any available, suitable and appropriate residence facility or institution as a place of confinement for any state prisoner and to transfer a prisoner from one place of confinement to another." *Vitek v. Jones*, 455 U.S. at 483. Here the detailed regulations surrounding interstate transfer of prisoners limit the discretion of the Hawaii administrator just as the Nebraska statute limited the discretion of the Nebraska administrator. No principled distinction can be drawn. If the statute in Nebraska created a liberty interest so does the Hawaii regulatory scheme, and Respondent must be afforded due process before he can be transferred to a Mainland prison.

II. INDEPENDENT OF THE STATE REGULATORY SCHEME AND PRACTICE, RESPONDENT RETAINED A RESIDUUM OF LIBERTY THAT WOULD BE INFRINGED BY A TRANSFER TO A MAINLAND PRISON WITHOUT COMPLYING WITH THE MINIMUM REQUIREMENTS OF DUE PROCESS.

Independent of the Hawaii regulatory scheme and practice, Respondent retained, even after his conviction and sentence, a "residuum of liberty" that would be infringed by a transfer to a Mainland prison "without complying with minimum requirements of due process." *Vitek v. Jones*, 455 U.S. 480, 491 (1980). Here the loss of liberty caused by the transfer to a Mainland prison is qualitatively different from the loss involved in an intrastate transfer. If an ordinary citizen were banished from his home state, there is no question "that protected liberty

interest would be unconstitutionally infringed absent compliance required by the Due Process Clause." *Vitek v. Jones,* 455 U.S. at 492. Banishment or transportation has always been considered a form of punishment in its own right which involves a grevious loss of liberty. In his dissenting opinion in *United States v. Ju Toy,* 198 U.S. 253, 269-71 (1905) Justice Brewer wrote:

> By all the authorities the banishment of a citizen is punishment, and punishment of the severest kind.
>
> * * *
>
> The forcible removal of a citizen from his country is spoken of as banishment, exile, deportation, relegation or transportation, but by whatever name called it is always considered a punishment. In Black's Law Dictionary "banishment" is defined as "a punishment inflicted upon criminals, by compelling them to quit a city, place, or country, for a specific period of time, or for life. It is inflicted principally upon political offenders, 'transportation' being the word used to express a similar punishment of ordinary criminals." The same author defines "exile" as banishment, and "transportation" as "a species of punishment consisting in removing the criminal from his own country to another (usually a penal colony), there to remain in exile for a prescribed period." In Rapalje & Lawrence's Law Dictionary (vol. 1, page 109), "banishment" is called: "A punishment by forced exile, either for years or for life; inflicted principally upon political offenders, 'transportation' being the word used to express a similar punishment of ordinary criminals." In 4 Bl. Com. 377 it is said: "Some punishments consist in exile or banishment, by abjuration of the realm, or transportation." Vattel Book 1, Sec. 228, declares: "As a man may be deprived of any right whatsoever by way of punishment — exile, which deprives him of the right of dwelling in a certain place, may be inflicted as a punishment; banishment is always one; for, a mark of infamy cannot be set on any one, but with a view of punishing him for a fault, either real or pretended."

> President Madison, in his report on the Virginia resolutions concerning the alien and sedition laws, said (4 Elliott's Debates, 455), referring to the possibilities which attend a removal from the country, "if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."
>
> The twelfth section of the English Habeas Corpus Act, 31 Car. II, one of the three great muniments of English liberty, enacted "that no subject of this realm, that now is or hereafter shall be an inhabitant or resident of this kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands, or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his majesty, his heirs or successors; and that every such imprisonment is hereby enacted and adjudged to be illegal . . . .

See also Fong Tue Ting v. United States, 149 U.S. 698, 709 (1893); *Cooper v. Telfair*, 4 Dall. 14 (1800).

Respondent's transportation to a Mainland prison involves substantial changes in the conditions of confinement beyond those justified by his sentence. He is physically separated by at least two thousand miles of ocean from his family, friends, and lawyer in Hawaii, for perhaps the rest of his life. As a Native Hawaiian, Respondent is physically separated from his whole culture, and he is denied access to personnel who are trained to understand the unique problems of Native Hawaiians.* Re-

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*For a discussion of the unique problems of Native Hawaiians, *see generally* 85 Congr. Rec., H.R., 1st Sess., 14703, 3/27/57, a speech by the late Governor John Burns, then Delegate to Congress; Pukui, Haertig, & Lee, *NANA I KE KUMU*, Vols. I & II (Queen Liliuokalanix Children's Center Publication) (a manual for social workers and others interested in Hawaiian culture); *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F.2d 1216 (9th Cir. 1978), (includes a discussion of a trust obligation imposed on Hawaii in providing benefits to Native Hawaiians).

spondent's isolation is nearly complete. As a Native Hawaiian he is placed in a prison system in which he is characterized among the ethnic groups of Caucasian, Black, and Hispanic, as "other."

Furthermore, Respondent was stigmatized by the corrections officials that effected his transfer as the "most dangerous and assaultive prisoner in the Hawaii prison system." (J.A. 27) He must bear the burden of that label throughout the remainder of his life in an alien prison environment. The burden of that label is substantial. It affects his relationships with other prisoners and with prison personnel. Despite his exemplary conduct, at least up to January 1974, this label will always be a negative factor in his record.

The consequences visited upon Respondent Wakinekona by his banishment from Hawaii and his transportation to a Mainland prison constitute "the kind of deprivations of liberty that requires procedural protections." *Vitek v. Jones*, 455 U.S. at 494. Certainly he had the right to a neutral factfinder. His complaint alleging that the factfinder was biased and prejudiced should not have been dismissed for failure to state a claim upon which relief may be granted.

CONCLUSION

By self-imposed rules and practice, Hawaii corrections officials chose to create a reasonable expectation that prisoners would not be transferred to a Mainland prison without good cause. Further, prisoners who are transferred from Hawaii to the Mainland suffer a substantial change in the conditions of their confinement. For both these reasons, Respondent has a liberty interest that is protected by the Due Process Clause. For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed and this cause remanded to the United States District Court for further pretrial proceedings and trial.

Respectfully submitted,

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No. 81-1581

In The

Supreme Court of the United States

October Term, 1981

ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, WINTON LEONG, and EDWIN SHIMODA,
Petitioners,

vs.

DELBERT KAAHANUI WAKINEKONA,
Respondent.

BRIEF OF THE STATES OF ALASKA, ARIZONA, FLORIDA, IDAHO, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING, THE DISTRICT OF COLUMBIA AND THE UNITED STATES TERRITORY OF AMERICAN SAMOA

IN SUPPORT OF PETITIONERS, AMICI CURIAE

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QUESTION PRESENTED

Whether the failure of state prison personnel to afford a state prisoner the exact manner of pre-transfer hearing established by state prison regulations implicates the Due Process Clause where absolutely no restraint or conditions are imposed by state law upon the ultimate decision of prison officials to execute the transfer in question.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Interest of the Amici Curiae	2
Constitutional Provision Involved	3
Statutes Involved	4
Statement of the Case	4
Summary of Argument	6
Argument:	
Introduction	7
I. The Source of the Predicate Right	8
II. The Contrary Authority	10
III. The Ninth Circuit's Analysis	11
IV. The Purpose of State Procedures	14
Conclusion	16
Appendix	App. 1

TABLE OF AUTHORITIES

Pages

CASES:

Bell v. Wolfish, 441 U. S. 520 (1979) 14

Cofone v. Manson, 594 F. 2d 934 (2d Cir. 1979) 11

Connecticut Board of Pardons v. Dumschat, 452 U. S. 458 (1981) 9, 10, 12, 15

Greenholtz v. Nebraska Penal Inmates, 442 U. S. 1 (1979) 8, 9, 12, 15

Lamb v. Hutto, 467 F. Supp. 562 (E. D. Va. 1979) 13

Lokey v. Richardson, 600 F. 2d 1265 (9th Cir. 1979), *cert. denied*, 449 U. S. 884 13

Lono v. Ariyoshi, 63 Hawaii —, 621 P. 2d 976 (1981) 6, 10

Meachum v. Fano, 427 U. S. 215 (1976) 8, 9, 10, 13, 14, 15, 16

Montanye v. Haymes, 427 U. S. 236 (1976) 10, 13

Morton v. Ruiz, 415 U. S. 199 (1974) 13

Sherman v. Yakahi, 549 F. 2d 1287 (9th Cir. 1977) 13

Vitek v. Jones, 445 U. S. 480 (1980) 9, 12

Wakinekona v. Olim, 459 F. Supp. 473 (D. Hawaii 1978) 2

Wolff v. McDonnell, 418 U. S. 539 (1974) 8, 9, 14, 15

CONSTITUTION:

United States Constitution, Fourteenth Amendment, Section 1 ..... 3, 5

TABLE OF AUTHORITIES—Continued

Pages

STATUTES:

28 U. S. C. § 1254(1) 2

42 U. S. C. § 1983 ..... 3, 4

Hawaii Rev. Stat. § 353-18 4

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IN SUPPORT OF PETITIONERS, AMICI CURIAE

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is attached to the Petition for Certiorari as Appendix A.

Its Order and Amendment of Opinion is attached to the Petition for Certiorari as Appendix B. That decision reversed the judgment of the United States District Court

for the District of Hawaii, attached to the Petition for Certiorari as Appendix C.

The Ninth Circuit decision was published in the advance sheets as 646 F. 2d 378, but was withdrawn from the bound volume at the request of the court. The District Court of Hawaii decision was published as *Wakinekona v. Olim*, 459 F. Supp. 473 (D. Hawaii 1978).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 26, 1981 (Appendix A, at A-1, attached to the Petition for Certiorari). The judgment was amended on November 27, 1981 (Appendix B, at B-1, attached to the Petition for Certiorari). The Petitioners' Motion for Reconsideration and Suggestion for Rehearing *En Banc* was denied on November 27, 1981 (Appendix B, at B-1, attached to the Petition for Certiorari). The majority of the Ninth Circuit voted against rehearing (Appendix B, at B-1, attached to the Petition for Certiorari). The jurisdiction of this Court was invoked by petitioners under 28 U. S. C. § 1254(1).

INTEREST OF THE AMICI CURIAE

The states noted above, by and through their respective Attorneys General (*see* Appendix), respectfully offer this brief as *amici curiae*, in support of the petitioners in

this case. As the chief legal officers of their respective states, it is the duty of these Attorneys General to advise the legislatures and correctional administrators of their states regarding the legal impact of their actions and enactments. Furthermore, it is the duty of these Attorneys General to represent the correctional administrators of their states in federal courts in litigation initiated pursuant to 42 U. S. C. § 1983, such as the present case. Corporation Counsel has the same duties with respect to the District of Columbia. For these reasons, the *amici* have a substantial and continuing interest in the balancing of state versus federal interests in state correctional facilities and the administration and supervision of that balance by the federal courts through 42 U. S. C. § 1983 litigation.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Hawaii Revised Statutes, Section 353-18:

> § 353-18 *Transfer of prisoner to federal institution.* The director of social services shall, with the approval of the governor, effect the transfer of a state prisoner to any federal correctional institution for imprisonment, subsistence, care, and proper employment of such a prisoner.

42 U. S. C. § 1983, *Civil action for deprivation of rights:*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondent, sentenced to life imprisonment without parole by a Hawaii state court, was an inmate of the maximum control unit of the Hawaii State Prison. "He is considered to be the most dangerous and assaultive inmate in the Hawaii prison system." Appendix A, at A-2, attached to the Petition for Certiorari.

On August 10, 1976, respondent appeared before a prison program committee to evaluate his overall prison

placement, including the possibility of a mainland transfer. After the hearing, the committee recommended to the prison administrator that respondent be transferred to the mainland. Appendix A, at A-2, attached to the Petition for Certiorari.

The prison administrator affirmed the recommendation and transferred respondent to Folsom State Prison in California. Under Rule IV, the administrator had plenary and unfettered discretion to "[a]ffirm or reverse, in whole or in part, the recommendation" of the program committee. Appendix D, at D-5, attached to the Petition for Certiorari.

Respondent filed suit in the United States District Court for the District of Hawaii, alleging, *inter alia,* that the procedures adhered to in his transfer hearing were in violation of the Due Process Clause of the United States Constitution.

The District Court dismissed the complaint on the ground that, under Rule IV (Appendix D, attached to the Petition for Certiorari), the prison administration had unlimited discretion, not subject to standards governing the exercise thereof, to transfer prisoners to the mainland. It therefore concluded that since respondent's transfer did not implicate a constitutionally protected liberty interest, due process did not attach. *See* Appendix C, attached to the Petition for Certiorari.

The United States Court of Appeals for the Ninth Circuit in a split (2 to 1) decision, reversed on the ground that the right to a state-guaranteed procedural hearing in Rule IV creates a "justifiable expectation" in having a hearing before transfer and thus triggers the Due Process Clause of the Fourteenth Amendment of the United

States Constitution. *See* Appendix A, attached to the Petition for Certiorari. The Ninth Circuit nevertheless recognized that its conclusion was in conflict with the "First, Second, and Sixth Circuits." Appendix A, at A-7, attached to the Petition for Certiorari.

Petitioners filed a Motion for Reconsideration and Suggestion for Rehearing *En Banc* alleging, *inter alia*, that a recent Hawaii Supreme Court case (*Lono v. Arigoshi*, Hawaii, 63 Hawaii —, 621 P. 2d 976 (1981), (Appendix E, attached to the Petition for Certiorari)) held that Rule IV's hearing procedure did not trigger due process protections:

> Thus . . . Rule IV of the Rules did not clothe plaintiff with the requisite liberty interest which would have triggered the application of the procedural requirements under the fourteenth amendment of the United States Constitution, Appendix E, at E-11, attached to the Petition for Certiorari.

The Ninth Circuit denied the motion in a split, 2 to 1, decision on November 27, 1981. *See*, Appendix B, attached to the Petition for Certiorari.

SUMMARY OF ARGUMENT

The purpose of the Due Process Clause is to protect a person's life, liberty or property. A state prisoner may be afforded a substantive liberty interest, protected by the Due Process Clause, by state law which restricts or preconditions the otherwise absolute discretion of those persons supervising the prisoner's incarceration. The pred-

icate to the invocation of the Due Process Clause is the existence of a substantive liberty interest created by state law.

The creation of state administrative procedures which in no manner limit or restrict the discretion of a state prison administrator's decision to transfer a prisoner cannot, alone, implicate the Due Process Clause as they create no substantive liberty interest in the prisoner.

The decision of the appeals court below is not supported by previous decisions of this Court and is directly contrary to the ruling of other circuits which have considered this question.

It would be contrary to the ultimate goal of the Due Process Clause—the elimination of arbitrary government action—to discourage states from formalizing information gathering procedures prior to the making of a discretionary administrative decision, particularly in situations where no substantive liberty interest has been created by state law.

ARGUMENT

INTRODUCTION

The Due Process Clause does not protect process. It protects a person's right to life, liberty or property. In this case the United States Court of Appeals for the Ninth Circuit (hereinafter the Ninth Circuit) has held that state created procedures are protected by the Due Process Clause. Apparently that court would argue that one can-

not be denied state afforded process without first being provided federally required process, regardless of whether a substantive liberty interest is implicated. This is process protecting process. It is not process protecting substantive rights, and it is not the purpose of the Due Process Clause.

I.

The Source of the Predicate Right

The initial inquiry in any case concerning the Due Process Clause must be whether the governmental action in question infringed or implicated an interest in life, liberty or property within the meaning of the Due Process Clause. *Meachum v. Fano*, 427 U. S. 215, 223 (1976). Insofar as a state prisoner is concerned, his liberty interests may have one of two sources. He may have a liberty interest created by the Constitution or it may be created by state law. *Wolff v. McDonnell*, 418 U. S. 539, 557 (1974).

One must first determine *if* a liberty interest exists at all.

> Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error-free determinations.

Greenholtz v. Nebraska Penal Inmates, 442 U. S. 1, 7 (1979).

To determine if a liberty interest has been created one must look to a *source* of the substantive rights which might give rise to that interest.

> The ground for a constitutional claim, if any, must be found in statutes or other rules defining the obligations of the [responsible governmental entity].

Connecticut Board of Pardons v. Dumschat, 452 U. S. 458, 465 (1981).

In previous prison transfer cases this Court has noted that many states afford their prisoners no reasonable basis to anticipate that they will not be transferred to other correctional facilities and that the mere absence of that state assurance does not implicate due process.

> Here, Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct. . . . On the contrary, transfer in a wide variety of circumstances is vested in prison officials. The *predicate* for invoking the protection of the Fourteenth Amendment as construed and applied in *Wolff v. McDonnell* [supra] is totally nonexistant in this case.

(Emphasis added.) *Meachum v. Fano, supra* at 226 (1976). The "predicate" to invoking the Due Process Clause is a *substantive*, state afforded liberty interest, not state afforded procedures. In each instance in which this Court has held the Due Process Clause applicable to a state prisoner's claim a substantive expectation of *liberty*, not procedure, has been found in state law. *Wolff v. McDonnell, supra*, a right to *early release* based upon state afforded good time credit; *Greenholtz v. Nebraska Penal Inmates, supra*, expectation of *parole* upon achieving certain statutory conditions; *Vitek v. Jones*, 445 U. S. 480 (1980), expectation that a state prisoner would not be involuntarily transferred to a mental hospital unless certain statutory criteria were found to exist.

In other cases considered by this Court, where a predicate substantive right to liberty was not found in state law, the Due Process Clause was not found applicable to state *procedures* involved in making the administrative decisions involved. *Meachum v. Fano, supra,* and *Montanye v. Haymes,* 427 U. S. 236 (1976), no state law restrictions on decision to transfer a prisoner; *Connecticut Board of Pardons v. Dumschat, supra,* no state law restrictions upon the discretion of the state pardon board's grant of commutation or clemency.

In the present case there exists absolutely no basis for the conclusion that the substantive, state created liberty interest necessarily predicate to the invocation of the Due Process Clause is present in the transfer regulations of the State of Hawaii. Absolutely no restraint or restriction is placed upon the ultimate administrative determination of whether to transfer the prisoner in question. *Lono v. Ariyoshi,* 621 P. 2d 976 (Hawaii 1981). It is the decision to transfer which impacts the respondent's liberty interest, not the purely advisory state created process which precedes that decision, and it is the decision to transfer which is unrestricted by state law. The discretion of the governmental decisionmaker in this instance is no more fettered than was that of his counterpart in *Meachum v. Fano, supra.* The facts of these cases being strikingly similar if not identical, the outcome of these cases should not be the sole means of distinguishing them.

II.

The Contrary Authority

The great weight of authority throughout the circuits is consistent with the preceding analysis and totally at

odds with the Ninth Circuit's decision in this case. Decisions of the other circuits are noted on pages 6 and 7 of the Petition for Writ of Certiorari. Perhaps the most concise articulation of the majority position on this matter is found in *Cofone v. Manson*, 594 F. 2d 934, 938 (2d Cir. 1979).

> Although the intendment of § 18-78a(b) may be ambiguous regarding what, if any, specific procedural safeguards Connecticut officials must observe before transferring a state prisoner, it is clear that the statute is not the source of a liberty interest protected by the Due Process Clause. Although a Due Process Clause liberty interest may be grounded in state law that places substantive limits on the authority of state officials, no comparable entitlement can derive from a statute that merely establishes procedural requirements.

III.

The Ninth Circuit's Analysis

A.

Although the Ninth Circuit's opinion pays lip service to the "substantive right" concept, it quickly substitutes the *presence* of state afforded procedures for the *existence* of the predicate state afforded liberty interest.

> We believe that the regulations in this case create a justifiable expectation that a prison transfer involving a "grievous loss" will not be carried out unless certain *procedures* are followed.

(Emphasis added.) Petition for Certiorari, at A-6.

There is no support in the previous rulings of this Court for the proposition that state afforded *procedures*

can create the substantive liberty interest necessary to invoke the protections of the Due Process Clause. To the contrary, this Court has previously noted that state afforded procedures are wholly irrelevant to a Due Process Clause analysis.

> These minimum [procedural] requirements being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate determining the preconditions to adverse official action. . . . In like manner, Nebraska's reliance on the opinion of a designated physician or psychologist for determining whether the conditions warranting transfer exist neither removes the prisoner's interest from due process protection nor answers the question of what process is due under the Constitution.

Vitek v. Jones, supra at 491. As state created procedures do not describe the process due under the Constitution when substantive liberty interests are present, neither should they be the source of the predicate substantive right which calls the Due Process Clause into play in the first instance.

This Court has specifically rejected the argument that state procedures can give birth to substantive rights protected by the Constitution. In *Connecticut Board of Pardons v. Dumschat, supra* at 465, the prisoner had argued that the procedures and practices of the state board of pardons had created the "expectation of liberty" discussed in *Greenholtz v. Nebraska Penal Inmates, supra.* This Court dismissed that contention and warned that "a contrary conclusion would trivialize the Constitution." *Id.* We agree.

B.

The Ninth Circuit opinion notes the weight of contrary authority among the other circuits and then cites as its authority only three cases. None of these cases, in our view, are dispositive or persuasive regarding the question presented.

Lokey v. Richardson, 600 F. 2d 1265 (9th Cir. 1979), *cert. denied,* 449 U. S. 884, is a case which neither addresses nor resolves this question. In *Lokey* the court simply acknowledged the holdings in *Meachum v. Fano, supra,* and *Montanye v. Haymes, supra,* and stated that "[u]ntil appellant has had an opportunity to explore and present his case with respect to state-created expectations, we cannot say his complaint failed to state a proper claim." *Id.* at 1267.

Lamb v. Hutto, 467 F. Supp. 562, 566 (E. D. Va. 1979), does conclude that the simple existence of state pre-transfer procedures creates a federal due process right to those procedures. However, that case never discusses the question of whether a state statute or regulation in any manner restricted the prison officials' determination regarding the transfers in question so as to create a *substantive* right in the prisoner not to be transferred. The failure of the court in *Lamb* to address that issue, in our view, totally flaws its holding.

In *Sherman v. Yakahi,* 549 F. 2d 1287 (9th Cir. 1977), the court repeats the following language from *Morton v. Ruiz,* 415 U. S. 199, 235 (1974), without further analysis. "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." In *Morton,* however, this Court was concerned with having a

federal court enforce and require compliance with the procedural rules of a *federal* agency. We do not believe this theory compels the federal courts to be responsible for the enforcement of state agency procedures in the absence of those procedures affecting a substantive liberty interest protected by the Due Process Clause.

IV.

The Purpose of State Procedures

It is clear that the purpose of Hawaii's pre-transfer procedure is to provide the ultimate decisionmaker with as much information and advice relative to his decision as possible. It does not appear to be contested that the ultimate decision to transfer the respondent, based upon that information and advice, was substantively correct.

We urge this Court to consider what practical good it does to create potential federal liability in a situation in which no substantive federal concern is involved. This Court has repeatedly noted that there is no constitutional mandate for states to limit the discretion of their correctional administrators. *Wolff v. McDonnell, supra; Meachum v. Fano, supra.* Furthermore, this Court has urged the district and circuit courts to recognize the fact that many of the decisions faced by prison personnel are best left to people with experience in correctional administration. *Bell v. Wolfish,* 441 U. S. 520 (1979). Under these circumstances it would not appear constructive to penalize a technical failure within a state system created to accomplish a laudable end.

The ultimate result of intervention by the federal courts in such non-substantive areas might well be the

elimination of formal information gathering procedures at the state level such as the procedure in question here. We would then be left with state officials holding the same unfettered discretion already recognized and deferred to by this Court in *Meachum v. Fano, supra,* and *Connecticut Board of Pardons v. Dumschat, supra,* without, perhaps, as reliable a source of information upon which to base these discretionary decisions as formal procedures might provide.

We urge the federal courts not to assume a posture that will actively discourage states from formalizing information gathering procedures to assist administrative personnel in making an enlightened and informed exercise of their admittedly discretionary powers. If one of the touchstones of due process is "protection of the individual against arbitrary action of government" (*Wolff v. McDonnell, supra* at 558), certainly we move no closer to that goal by discouraging states from creating procedures to diminish the potential for arbitrary action. This is particularly true where the decision which is to be ultimately made does not implicate the Due Process Clause. *Greenholtz v. Nebraska Penal Inmates, supra* at 7.

The logic of the Ninth Circuit's decision in this case, if not reversed, leads inexorably towards entanglements and conflicts between the states and the federal government in non-substantive areas. This Court has previously acknowledged that such a path is unacceptable.

> To hold [such procedures] are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in

issues and discretionary decisions that are not the business of federal judges.

Meachum v. Fano, supra at 228, 229.

———o———

CONCLUSION

For the foregoing reasons we urge this Court to reverse the decision below and approve the determination of the district court in dismissing this action.

Respectfully submitted,

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NO. 81-1581

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, WINTON LEONG, and EDWIN SHIMODA,
Petitioners,

V.

DELBERT KAAHANUI WAKINEKONA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Amicus Brief of the Commonwealth of Massachusetts and sister States *

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TABLE OF CONTENTS

INTEREST OF AMICI.....1

SUMMARY OF ARGUMENT.....3

ARGUMENT.....6

A. THE COURT OF APPEALS FOR THE NINTH CIRCUIT MISAPPLIED MEACHUM V. FANO, 427 U.S. 215 (1976) AND MONTANYE V. HAYMES, 427 U.S. 236 (1976).....6

B. THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT GUARANTEE THAT AN AGENCY WILL STRICTLY FOLLOW ITS PROCEDURAL RULES.....29

C. TO THE EXTENT THIS COURT HOLDS THAT PROCEDURAL RULES CREATE A PROTECTED LIBERTY INTEREST, A DISTINCTION MUST BE MADE BETWEEN RULES WHICH ARE ADJUDICATORY AND THOSE WHICH ARE INVESTIGATIVE.....42

D. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO ADOPT THE INTREPRETATION OF THE REGULATIONS BY THE HIGHEST COURT OF THE STATE OF HAWAII.....47

CONCLUSION.....49

TABLE OF AUTHORITIES

Accardi v. United States ex rel. Shaughnessy,
347 U.S. 260
(1954).....30, 31, 32, 35, 42

American Farm Lines v. Black Ball Freight Service,
397 U.S. 532, 539 (1970).....45

Arnett v. Kennedy,
416 U.S. 134, 155 (1974).....41

Cafeteria Workers v. McElroy,
367 U.S. 886, 895 (1961).....42

Bills v. Henderson,
446 F.Supp. 967, 974
(E.D. Tenn 1978), aff'd
631 F.2d 1287,
(6th Cir. 1980)..2, 5, 19, 22, 29

Bishop v. Wood, 426 U.S. 341
(1976).....47

Board of Curators of the University of Missouri, et al v. Horowitz,
435 U.S. 91 (1978).....4, 33

Board of Regents v. Roth,
408 U.S. 564 (1972).....10, 47

Cofone v. Manson,
594 F.2d 934, 937,
(2nd Cir. 1979).....2, 18, 28
Daigle v. Hall,
564 F.2d 884 (1st Cir. 1977).....28

Four Certain Unnamed Inmates of MCI Walpole v. Hall,
550 F.2d 1291 (1st Cir. 1977)....28

Gagnon v. Scarpelli,
411 U.S. 778 (1973).....11

German v. Killeen,
495 F.Supp. 822
(E.D. Michigan 1980).....42

Greenholtz v. Inmates of Nebraska Penal and Correctional Complex,
442 U.S. 1
(1979)....9, 10, 11, 18, 21, 27, 36, 42, 46

Jones v. North Carolina Prisoners' Union,
433 U.S. 119, 137 (1977).....39

Lombardo v. Meachum,
548 F.2d 13
(1st Cir. 1977).....2, 8, 17, 18, 22, 28

Meachum v. Fano,
427 U.S. 215
(1976)....2, 6, 8, 10,11, 12, 14, 16, 18, 21, 27, 28, 40, 42

Montanye v. Haymes,
427 U.S. 236 (1976).....4, 6, 14, 21, 22, 42

Moody v. Daggett,
429 U.S. 78, 88, n.9 (1976).....42

Morrissey v. Brewer,
408 U.S. 471 (1972).....11

Parrott v. Taylor,
451 U.S. 527, 543-544 (1981).....39

Perry v. Sindermann,
408 U.S. 593, 597 (1972).....18

Pugliese v. Nelson,
617 F.2d 916, 924,
(2nd Cir. 1980).....18, 26

Satterfield v. Clark,
514 F.Supp. 1323
(M.D. Ala., 1981).....42

Service v. Dulles,
354 U.S. 363 (1957).....31, 34

Sisbarro v. Warden, Massachusetts State Penitentiary, 592 F.2d 1, 3
(1st Cir. 1979).....18, 22, 28

State of Missouri, ex rel. Gore v. Wochner,
620 F.2d 183 (8th Cir. 1980).....42

United States v. Caceres,
440 U.S. 744 (1978).....5, 36, 43

Vitarelli v. Seaton,
359 U.S. 535 (1959).....31

Wakinekona v. Olim,
459 F.Supp. 473, 475
(D. Hawaii, 1978).....3, 8, 9

Wakinekona v. Olim,
664 F.2d 708, 709
(9th Cir. 1981)...1, 7, 9, 19, 28, 32

Wolff v. McDonnell,
418 U.S. 539 (1974).....8, 11

INTEREST OF AMICI

In Wakinekona v. Olim, 664 F.2d 708, (9th Cir. 1981) the Ninth Circuit Court of Appeals held that state prison regulations setting forth procedural rules governing interstate prison transfers in the State of Hawaii created a liberty interest protected by the Due Process Clause of the United States Constitution despite the absence of any substantive limitation on the decision-maker's absolute authority to order such transfers pursuant to state law. In so holding, the court expressly stated that it disagreed with the First, Second, and Sixth Circuits which had previously rejected similar claims and held that procedures mandated by particular prison transfer regulations did not create a liberty interest protected by the Due Process Clause.

664 F.2d at 711. [citing Lombardo v. Meachum, 548 F.2d 13, 15 (1st Cir. 1977); Cofone v. Manson, 594 F.2d 934, 938 (2nd Cir. 1979); and Bills v. Henderson, 631 F.2d 1287, 1298-99 (6th Cir. 1980)]. Because the procedural regulations in question in this case are virtually identical to the Massachusetts procedural regulations considered by the First Circuit Court of Appeals in Lombardo v. Meachum, supra, the Commonwealth of Massachusetts has an acute interest in supporting the state of Hawaii and seeking reversal of the Ninth Circuit's decision. We would also point out that the decision of the district court which was reversed by the Ninth Circuit was based primarily on Lombardo v. Meachum, supra. See Wakinekona v. Olim, 459 F.Supp. 473, 475, 476 (D. Hawaii, 1978).

SUMMARY OF ARGUMENT

1. The Ninth Circuit Court of Appeals misapplied Meachum v. Fano, 427 U.S. 215 (1976) and Montanye v. Haymes, 427 U.S. 236 (1976) in holding that Hawaii prison regulations governing inmate classification created a liberty interest protected by the Due Process Clause in the absence of a substantive limitation on the decision-maker's unfettered discretion to order transfers and classify inmates pursuant to state law.

2. The Due Process Clause of the United States Constitution does not guarantee that an agency will strictly adhere to all of its procedural rules. While such

adherence is desirable, every deviation from state procedures cannot be considered a federal constitution violation cognizable in a civil rights action. Such a holding would dangerously and unnecessarily make a large volume of state proceedings arising not only in the prison setting, but also all administrative and judicial proceedings which are governed by procedural rules subject to complaint in federal district court on due process grounds. See Bills v. Henderson, 631 F.2d 1287, 1289 (6th Cir. 1980). Moreover, a similar claim previously has been rejected by this Court in the context of a student's academic dismissal. Board of Curators of the University of Missouri, et al v. Horowitz, 435 U.S. 91, 93 (1978).

3. To the extent this Court holds that compliance with state procedural rules is constitutionally mandated, a distinction must be drawn between rules which are adjudicatory and those which are investigative. See, United States v. Caceres, 440 U.S. 744 (1979).

4. A federal court must accept the interpretation of a state regulation by the highest court of the state unless it is unreasonable. Bishop v. Wood, 426 U.S. 341 (1976). In this case, the lower court erred in declining to accept the construction of the state regulation in question by the Supreme Court of Hawaii in the absence of a finding of unreasonableness.

ARGUMENT

A. THE COURT OF APPEALS FOR THE NINTH CIRCUIT MISAPPLIED MEACHUM V. FANO, 427 U.S. 215 (1976) AND MONTANYE V. HAYMES, 427 U.S. 236 (1976).

The instant controversy stems from a civil rights action filed in the United States District Court for the District of Hawaii by a state prisoner who had been transferred from a state prison in Hawaii to a mainland prison in California allegedly in violation of state prison classification regulations governing interstate transfers. The inmate, Delbert Kaahanui Wakinekona, claimed that his transfer violated the Due Process Clause of the United States Constitution because the committee which recommended his transfer was biased against him. Specifically, he alleged that the committee was composed of the same persons who initiated the transfer

proceedings in direct violation of Hawaii prison regulations.[1/] Wakinekona v. Olim, 664 F.2d 708, 709 (9th Cir. 1981). The district court dismissed the complaint but the Ninth Circuit Court of Appeals reversed.

The procedural history of this case reveals that the district court had the unique opportunity to consider twice the appropriateness of dismissal. Initially, in a Memorandum and Order

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1/ The provision of the Hawaii prison classification regulations relied upon by Wakinekona provides the following:

> The facility administrator shall establish an impartial Program Committee composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee. The facility administrator shall not sit as a member of the Committee

dated October 1, 1976, the district court, relying on this Court's decision in Wolff v. McDonnell, 418 U.S. 539 (1974), held that Wakinekona's classification hearing violated his right to due process. Wakinekona v. Olim, 459 F.Supp. 473, 475 (D. Hawaii, 1978). Subsequently, however, relying on Meachum v. Fano, 427 U.S. 215 (1976) as interpreted by the First Circuit Court of Appeals in Lombardo v. Meachum, 548 F.2d 13 (1st Cir. 1977), which had been decided in the interim on almost identical facts, the court reversed itself and dismissed Wakinekona's action stating:

> "The pertinent Hawaii State regulations do not contain standards governing the administrator's exercise of such discretion. Indeed the regulations reserve in the administrator, "as the final decision-maker," the right to affirm or reverse, wholly or partially, the recommendation

> of the Program Committee. Since Wakinekona's transfer did not implicate a constitutionally-protected "liberty interest," due process did not attach. The First Claim for Relief alleging a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution must therefore be dismissed." Wakinekona v. Olim, supra, 459 F.Supp at 476.

On appeal, the Ninth Circuit Court of Appeals, reversed:

> "In our view, these regulations create a justifiable expectation that a prisoner will not be transferred absent specified procedures. They consequently give rise to a constitutionally protected liberty interest." Wakinekona v. Olim, supra, 664 F.2d at 711, 712.

This holding was error.

The Due Process Clause of the Constitution of the United States prohibits a state from depriving a person of life, liberty or property without due process of law. Greenholtz v. Inmates of Nebraska Penal and

Correctional Complex, 442 U.S. 1 (1979); Meachum v. Fano, 427 U.S. 215, 223 (1976). Accordingly, when there is a claimed denial of due process, a court must inquire into the nature of the individual's claimed interest:

> "To determine whether due process requirements apply in the first place, a court must not look to the "weight" but to the nature of the interest at stake. Board of Regents v. Roth, 408 U.S. 564, 570-571 (1972). This has meant that to obtain a protectible right, a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead, have a legitimate claim of entitlement to it." Greenholtz v. Nebraska Penal and Correctional Complex, supra at 7.

This Court has already had occasion to apply this principle of Constitutional law to various aspects of state prison administration and in

particular, to the subject of prison transfers.[2/] In Meachum v. Fano, it was held that the Due Process Clause of its own force did not entitle a duly convicted state prisoner to a fact-finding hearing when he is transferred from one prison to another, the conditions of which are substantially less favorable to him, absent a state law conditioning such transfers on proof of misconduct or other specified events. Since Meachum involved issues almost identical to

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2/ As applied to other areas of prison administration, see for example Wolff v. McDonnell, 418 U.S. 539 (1974) (the imposition of isolation and the loss of statutory good time must comport with procedural due process); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation revocation); Greenholtz v. Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) (state statute making parole mandatory unless certain facts existed required parole decisions to comply with procedural due process).

those in the instant controversy, a detailed discussion of the case is appropriate.

In Meachum, several Massachusetts state prison inmates had brought an action under 42 U.S.C. §1983 alleging that they had been denied due process of law since prison officials had ordered them transferred from a medium security institution to a maximum security institution having substantially less favorable conditions without an adequate fact-finding hearing. Meachum v. Fano, supra at 222. Both the District Court and the First Circuit Court of Appeals agreed, holding that the inmate's due process rights were violated. On writ of certiorari to the Supreme Court of the United States, however, those decisions were reversed.

This Court first rejected outright the notion that any "grievous loss" visited upon a person by the State is sufficient to invoke the procedural protection of the Due Process Clause:

> "We cannot agree that any change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. The Due Process Clause by its own force forbids the State from convicting any person of crime and depriving him of his liberty without complying fully with the requirements of the Clause. But given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution...." To hold as we are urged to do that <u>any</u> substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would

> subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts. Meachum v. Fano, supra at 224.

The Court continued:

> "Transfers between institutions, for example, are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate. Yet under the approach urged here, any transfer, for whatever reason, would require a hearing as long as it could be said that the transfer would place the prisoner in substantially more burdensome conditions that he had been experiencing. We are unwilling to go so far. Thus it is clear that the Due Process Clause of its own force does not mandate a pre-transfer hearing even when a grievous loss is involved. Id., at 224, 225. See also Montanye v. Haymes, 427 U.S. 236 (1976).

This Court also rejected the inmate's claim of entitlement based on state law. While acknowledging that as a general principle, a prisoner's transfer may infringe a Due Process Clause liberty interest where there exists "some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events," the Court, upon examining Massachusetts law governing inter-institutional transfers found no such right:

> "Here, Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct. Insofar as we are advised, transfers between Massachusetts prisons are not conditioned upon the occurrence of specified events. On the contrary,

> transfer in a wide variety of circumstances is vested in prison officials. The predicate for invoking the protection of the Fourteenth Amendment as construed and applied in Wolff v. McDonnell is totally nonexistent in this case." Meachum v. Fano, supra at 226, 227.

Significantly, the Massachusetts statute governing inter-institutional transfers within the state vested absolute discretion in the Commissioner of the Department of Correction to transfer an inmate from one institution to another for any reason or for no reason at all.[3/]

While Meachum and Montanye go a long way toward resolving the question involved in this controversy, those cases do not purport to contain the last

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3/ M.G.L. c.127, §97 provided, inter alia,:

> The commissioner may transfer any sentenced prisoner from one correctional institution of the Commonwealth to another...

word on the due process ramifications of prison transfers. Lombardo v. Meachum, supra, 548 F.2d at 15. Indeed, there are differences between the facts in those cases and the facts underlying the instant controversy. For example, Meachum and Montanye both were concerned only with an alleged liberty interest arising out of state law, not one that purportedly derives from a state regulation. Also, those cases involved only intra-state as opposed to inter-state transfers. Nevertheless, Meachum and Montanye must be construed as establishing the only backdrop against which a court should assess the adequacy of an allegation concerning the existence of a state created liberty interest and corresponding denial of due process. Moreover, the aforementioned factual distinctions are of little or no

significance in terms of applying the due process analysis.

Massachusetts does not contend that state regulations can never give rise to a protected liberty interest. Such a position is clearly untenable in view of this Court's decisions in Meachum v. Fano, supra at 229; Greenholtz v. Nebraska Penal and Correctional Complex, supra and Perry v. Sindermann, 408 U.S. 593, 597 (1972). We do submit, however, that in analyzing the question whether a particular regulation supports a protected liberty interest, a distinction must be drawn between regulations that are substantive and those which are merely procedural. Lombardo v. Meachum, supra; Sisbarro v. Warden, Massachusetts State Penitentiary,592 F.2d 1 (1st Cir. 1979) Cofone v. Manson, 594 F.2d 934, 937, 938(2nd Cir. 1979); Pugliese v. Nelson,

617 F.2d 916, 924, 925 (2nd Cir. 1980); Bills v. Henderson, 446 F.Supp. 967, 974 (E.D. Tenn 1978), aff'd 631 F.2d 1287, 1298-99 (6th Cir. 1980). Due process rights would clearly attach to the former but not to the latter. It is in this regard that the Ninth Circuit Court of Appeals misapplied the due process calculus.

The Court of Appeals for the Ninth Circuit held that the Hawaii prison regulations created a justifiable expectation that a prison transfer involving a "grievous loss" would not be carried out unless certain procedures are followed.[4/] Wakinekona v. Olim,

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4/ The Hawaii classification regulations in question provide for a hearing before an impartial Program Committee when a transfer involves a "grievous loss" to the inmate. The regulations also characterize a grievous loss as an interstate transfer such as

(footnote continued)

supra 664 F.2d at 711. It then observed that the regulations were not without substantive content:

> "...their clear import is that a transfer will not be carried out absent a hearing directed to proof of the facts alleged in notice received beforehand by the prisoner. In our view, these regulations create a justifiable expectation that a prisoner will not be transferred absent the specified procedures. They consequently give rise to a constitutionally protected liberty interest." Id. at 711, 712.

While the precise reasoning underlying the court's finding of a constitutionally protected liberty

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(footnote continued)

the one Wakinekona was subjected to in the instant controversy. Nevertheless, the Court of Appeals for the Ninth Circuit, quite correctly, did not find the existence of this language alone sufficient to establish a state created liberty interest. Rather, the court held that the procedural rules themselves were a Constitutionally protected liberty interest. Wakinekona v. Olim, supra 664 F.2d at 711, 712.

interest in the Hawaii regulations is somewhat unclear, its conclusion cannot be supported under any theory. To the extent the Ninth Circuit might have relied on the existence of the "grievous loss" language, the decision cannot be sustained, for in Meachum v. Fano, supra and Montanye v. Haymes, supra, this Court expressly rejected the "grievous loss" approach to questions of procedural due process in prison transfer cases. In those cases, it was established that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the

occurrence of other specified events. Montanye v. Haymes, supra, at 242. See also, Sisbarro v. Warden, Massachusetts State Penitentiary, 592 F.2d 1, 3 (1st Cir. 1979).

It might also be that the Ninth Circuit was of the opinion that the regulations, although admittedly procedural in nature, placed substantive restrictions on the decision maker's otherwise unfettered discretion to order a transfer.5/

5/ This precise question was left unanswered by the First Circuit Court of Appeals in Lombardo v. Meachum, supra. There, the court stated:/ We do not regard it as inconceivable that substantive protections could be inferred from the existence of procedural safeguards but where, as here, the practice is that there are no limitations on the administrator's discretion in those matters, we see no basis for doing so. Id., at 16. See also, Bills v. Henderson, 446 F.Supp. 967, 974 (E.D. Tenn. 1978), aff'd 631 F.2d 1287 (6th Cir. 1980).

This approach, however, would also be erroneous since it involves a misreading of the pertinent regulation.

The authority by which an Hawaii inmate is transferred from a local state prison in Hawaii to a mainland prison in California is contained in Section 353-18 of the Hawaii Revised Statutes which provides:

> §353-18 Transfer of prisoner to federal institution. The director of social services shall, with the approval of the governor, effect the transfer of a state prisoner to any federal correctional institution for imprisonment, subsistence, care and proper employment of such a prisoner.

This statute clearly empowers the Director of Social Services to transfer without limitation an Hawaii prisoner from a state prison to federal penitentiary. Wakinekona v. Olim,

supra, 664 F.2d at 713, (Goodwin, J., dissenting).[6/]

In addition to this statutory provision, there exist certain unrelated Hawaii prison regulations concerning inmate classification. The stated nature and purpose of those regulations is contained in a preamble:

> THE CLASSIFICATION PROCESS
>
> 1. General:
>
> "An inmate's/ward's classification determines where he is best situated within the Corrections Division. Rather than being concerned with isolated aspects of the individual or punishment (as is the adjustment process), classification is a dynamic process which considers the individual, his history, his changing needs, the resources and facilities available to the Corrections Division, the other

6/ In this case, it appears that Wakinekona was transferred from an Hawaii state prison to another state penitentiary. Whether the applicable statute authorizes such interstate transfers as opposed to inter-system transfers does not appear to be an issue in this case.

> inmates/wards, the exigencies of the community, and any other relevant factors. It never inflicts punishment; on the contrary, even the imposition of a stricter classification is intended to be in the best interests of the individual, the State, and the community. In short, classification is a continuing evaluation of each individual to ensure that he is given the optimum placement within the Corrections Division."

According to the express terms of the classification rules, a pretransfer hearing must be held before an "impartial program committee" if a change in the prisoner's classification will cause the prisoner a "grievous loss". The committee, however, is enpowered only to make a recommendation and the facility administrator is expressly permitted to

disregard the judgment of the program committee for any reason or for no reason at all.

A literal reading of these rules, as it is not alleged that in practice the rules are applied any differently, makes it most difficult to understand how these regulations can be deemed to create a substantive limitation on the decision-maker's otherwise unfettered discretion to transfer prisoners within his custody, power and control. The classification regulations simply do not disturb the decision-maker's absolute discretion to make an interstate transfer nor do they limit his discretion to change a prisoner's classification. Pugliese v. Nelson, supra, 617 F.2d 916 (2nd Cir. 1980). At most, the regulations are designed to furnish the decision-maker with

information to assist him in making an informed decision as to the classification that is most suitable to the needs of the inmate, the facility and society. Meachum v. Fano, supra at 225. As this Court noted in a slightly different context, it is not surprising therefore, that unlike prison discipline, parole revocation and probation revocation, there is no prescribed or defined combination of facts which if shown would mandate placement in one particular institution or another. Greenholtz v. Nebraska Penal and Correctional Complex, supra at 9. To the contrary, the classification decision turns on a discretionary assessment of a multiplicity of imponderables, entailing what a man is and has become rather than simply what he has done. Id. at 10. Thus, where as

here, the role of the classification decision-maker is predictive rather than factual and the governing procedural regulations do not in any way substantively limit his otherwise discretionary decision-making power, the conclusion must be that a complaint alleging a procedural irregularity during a classification hearing fails to state a claim for relief under 42 U.S.C. §1983. In this case, there is simply no substantive liberty interest protected by the Due Process Clause. Lombardo v. Meachum, supra; Bills v. Henderson, supra; Cofone v. Monson, supra; Sisbarro v. Warden, Massachusetts State Pennitentiary, supra. See also Daigle v. Hall, 564 F.2d 884 (1st Cir. 1977) and Four Certain Unnamed Inmates of MCI Walpole v. Hall, 550 F.2d 1291 (1st Cir. 1977) (holding that classification

regulations governing inmate transfers from the general prison population to segregation do not create a liberty interest requiring procedural due process).

B. THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT GUARANTEE THAT AN AGENCY WILL STRICTLY FOLLOW ITS PROCEDURAL RULES.

The Court of Appeals for the Ninth Circuit, relying primarily on this Court's decision in Accardi v. Shaughnessey, 347 U.S. 260, 267 (1954), held that state procedural rules, ipso facto, are Constitutionally protected liberty interests. Wakinekona v. Olim, supra, 664 F.2d at 712. In so holding, the court seemed to suggest that the Due Process Clause mandates strict adherence by an agency to its procedural rules even when those rules are not otherwise constitutionally mandated and when there

is no correlative substantive liberty interest contained in the regulations or otherwise. This holding is error.

In Accardi v. Shaughnessey, supra, this Court was faced with a federal habeas corpus action filed on behalf of an alien who had been denied an application for suspension of a deportation order under the provisions of §19(c) of Immigration Act of 1917. Admittedly deportable, the petitioner contended, inter alia, that the denial of his application was invalid since certain regulations, having the force and effect of law, and which governed the procedures to be followed in processing and passing upon an alien's application for suspension of deportation were not followed. Relief was denied by both the District Court and the Second Circuit Court of

Appeals. After granting certiorari, this Court reversed, holding that the petitioner's allegations concerning the violation of admittedly valid regulations did indeed state a claim and warranted a hearing in the District Court. Accardi v. Shaughnessey, supra at 268.

For a time, it was thought that Accardi and its progeny[7/] stood for the proposition that compliance by an agency with its

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7/ Service v. Dulles, 354 U.S. 363 (1957) (federal declaratory judgment action in which this Court invalidated the Secretary of State's dismissal of an employee where regulation requiring approval of the Deputy Undersecretary and consultation of full record were not satisfied); Vitarelli v. Seaton, 359 U.S. 535 (1959) (federal declaratory judgment action in which this court relying on Service v. Dulles, supra, invalidated the dismissal of an Interior Department employees where regulations governing hearing procedures for national security dismissals were not followed).

procedural regulations was mandated by the Constitution. Wakinekona v. Olim, supra, 664 F.2d at 712. Massachusetts contends that such an interpretation of Accardi is erroneous.

In Accardi, the question before the Court did not involve a state created liberty interest. Nor was it a case concerning a federally created liberty interest. Rather, as this Court clearly stated in its opinion:

> "The crucial question [was] whether the alleged conduct of the Attorney General deprived the petitioner of any of the rights guaranteed him by the statute or by the regulations issued pursuant thereto." [emphasis added] 347 U.S. at 265.

Thus, it should have been obvious that Accardi had nothing at all to do with Constitutional law and procedural due process.

Any doubt about this interpretation of Accardi was finally set aside in Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78 (1978). In that case, a medical student who had been dismissed from the University of Missouri-Kansas City Medical School for academic reasons filed suit under 42 U.S.C. §1983, alleging, among other constitutional violations, that she had not been accorded procedural due process prior to dismissal. On certiorari to the United States Supreme Court following a jury trial in the district court where it was determined that the claimant had been afforded all of her rights under the Fourteenth Amendment, this Court stated:

> "Respondent also contends that petitioners failed to follow their own rules respecting evaluation of medical students and that

this failure amounted to a constitutional violation under Service v. Dulles, 354 U.S. 363 (1957). We disagree with both respondent's factual and legal contentions. As for the facts, the record clearly shows that the school followed its established rules, except where new rules had to be designed in an effort to further protect respondent, as with the practical "appeal" that petitioners allowed respondent to take. The District Court specifically found that "the progress status of [respondent] in the medical school was evaluated in a manner similar to and consistent with the evaluation of other similarly situated students, with the exception that [respondent's] docent went to even greater lengths to assist [respondent] in an effort for her to obtain her M.D. degree, than he did for any of his other students." App. 45. As for the legal conclusion that respondent draws, both Service and Accardi v. United States ex rel. Shaughnessy, 347 U.S. 260 (1954), upon which Service relied, enunciate principles of federal

> administrative law rather than of constitutional law binding upon the States." 435 U.S. at 93, n.9.

This Court ultimately agreed with the District Court's finding in Accardi that the student had, as a factual matter, been afforded adequate procedural due process prior to dismissal. Nevertheless, the only doctrine that emerges from the case is that while compliance with agency rules is certainly a desirable result, it does not follow that in all cases where deviations from procedural rules are alleged, a constitutional question is presented. The duty to enforce an

agency regulation is most evident only when compliance with the regulation is independently mandated by the Constitution or federal law. United States v. Caceres, 440 U.S. 741, 749 (1979). Compliance with procedural rules is not, in all cases, however, mandated by the Constitution.

The case of Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, supra, relied upon by the Ninth Circuit, is not to the contrary. In that case, this Court found that the statutory provisions governing parole release in the State of Nebraska created substantive limitations on the decision-maker's power to refuse to grant a parole permit. It did not purport to announce a new rule of constitutional law that agencies who decline to follow their procedural rules

or err in their application violate the aggrieved person's right to due process and thus become individually liable under 42 U.S.C. §1983. As this Court remarked in Greenholtz:

> Respondents emphasize that the structure of the provision together with the use of the word "shall" binds the Board of Parole to release an inmate unless any one of the four specifically designated reasons are found. In their view, the statute creates a presumption that parole release will be granted, and that this in turn creates a legitimate expectation of release absent the requisite finding that one of the justifications for deferral exists. We can accept respondents' view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection. However, we emphasize that this statute has unique structure and language and thus whether any other state statute provides a protectable entitlement must be decided on a case-by-case basis." 442 U.S. at 13.

Massachusetts submits that failure to reverse in this case will result in an unnecessary proliferation of prison transfer cases in federal court since there would be created a new constitutional rule requiring states to adhere strictly to any and all procedural rules promulgated by them. This would, of course, require the Court to depart from its traditional due process liberty interest analysis and have serious ramifications both within and without the correctional sphere of state administration. While adherence to procedural rules is certainly desirable, every deviation from state procedures cannot be viewed as a federal constitutional violation.

This Court has already noted that not every tort claimed to have been committed by prison officials

constitutes a constitutional violation cognizable under §1983. Parrott v. Taylor, 451 U.S. 527, 543-544 (1981). Similarly, not every violation of state procedural rules, unless the rule is independently determined to be mandated by the Constitution following application of the traditional due process equation, can be deemed a constitutional violation. A holding to the contrary would only serve to dangerously shackle prison officials in carrying out one of the most vexing of all state responsibilities - that of operating a penological institution. Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 137 (1977) (Burger, C.J., concurring).

This controversy is really nothing more than another example of a long line of cases brought in federal court

raising questions concerning the authority of a state to regulate and administer matters peculiarly local in nature. Id. at 136, 137. Federal courts, however, are not equipped by experience or otherwise to "second guess" the decision of state legislatures and administrators in the sensitive area of prison administration except in the most extraordinary circumstance. Id. at 136. The Due Process Clause must not be placed astride of the day-to-day functioning of state prisons. Meachum v. Fano, supra at 228-229. Federal court judges should not sit to supervise state prison administration. Id.

The very nature of due process negates any concept of inflexible procedures universially applicable to every imaginable situation. Arnett v.

Kennedy, 416 U.S. 134, 155 (1974), citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). Section 1983, like the habeas corpus proceeding in Accardi, was enacted for the purpose of enforcing and redressing constitutional and federal rights, not to transfer to the federal courts control over all executive decision-making. Accardi v. Shaughnessey, supra at 269 (Jackson, J., dissenting). Such an interpretation of §1983 would unwisely, if not improperly, thrust upon the federal courts the task of reviewing every discretionary function of state executive officers. Id. at 271. Moreover, it is well settled that decisions of the Executive Branch, however serious, do not automatically invoke due process protection; there simply is no guarantee that all executive decision-making must

comply with standards to assure error-free determinations. Greenholtz v. Nebraska Penal and Correctional Complex, supra at 8. (citing Meachum v. Fano, supra at 225; Montanye v. Haymes, supra; and Moody v. Daggett, 429 U.S. 78, 88, n.9 (1976). Thus, it is axiomatic that not every violation of state law by state officials acting under color of state law constitutes a violation of section 1983. Satterfield v. Clark, 514 F.Supp. 1323 (M.D. Ala., 1981); State of Missouri, ex rel. Gore v. Wochner, 620 F.2d 183 (8th Cir. 1980); German v. Killeen, 495 F.Supp. 822 (E.D. Michigan 1980).

C. TO THE EXTENT THIS COURT HOLDS THAT PROCEDURAL RULES CREATE A PROTECTED LIBERTY INTEREST, A DISTINCTION MUST BE MADE BETWEEN RULES WHICH ARE ADJUDICATORY AND THOSE WHICH ARE INVESTIGATIVE.

Wakinekona would contend that all procedural rules, whatever their nature

or purpose, are per se, protected by the Due Process Clause. To the extent this Court is inclined to agree, Massachusetts would urge that a distinction be drawn between procedural rules which are adjudicatory and those which are investigative.

In the past, this Court has attached great significance to the nature and purpose of procedural rules when considering remedies for non-compliance. For example, in United States v. Caceres, 440 U.S. 744 (1978), the Court was unwilling to mandate the suppression of certain evidence derived from an electronic surveillance on due process grounds, despite the fact that the information had been obtained in direct violation of mandatory federal regulations governing eavesdropping. The Court stated:

> "Nor is this a case in which the Due Process Clause is implicated because an individual has reasonably relied on agency regulations promulgated for his benefit and has suffered substantially because of their violation by the agency." 440 U.S. at 753.

Thus, where procedural rules are intended only to facilitate the development of relevant factual information for the decision-maker, as are classification regulations, no due process rights are affected. Moreover, it is well settled that as a general principle, it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules which may have been adopted for the purpose of fostering the orderly transaction of business. See American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539 (1970).

Prison transfer decisions and questions of parole release are very different from those concerning the revocation of parole and probation as well as prison discipline. The procedural rules governing classification and parole eligibility are designed only to facilitate the accumulation of an amalgam of elements, some factual but many of which are purely subjective and often based only on experience with the difficult and sensitive task of inmate placement. On the other hand, rules governing prison discipline and parole and probation revocation proceedings are directed towards eliciting purely historical facts in a quasi-judicial manner. Unlike the revocation decision, however, in prison placement there is no given set of facts which, if shown, would

mandate a decision one way or another. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, supra at 10, 11.

Prison placement in Hawaii does not depend upon an adjudication of historical facts. The classification boards do not purport to exercise a quasi-judicial function. Rather, their purpose is only to assist the decision-maker so that he can make an informed decision. Such boards do not guarantee the correctness of that decision. Therefore, to the extent this Court is inclined to hold that procedural rules are constitutionally protected, it must limit its holding to those rules which govern an adjudicatory process and exclude from the decision procedural regulations, like the classification regulations in this case,

which are designed to be purely investigative.

D. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO ADOPT THE INTREPRETATION OF THE REGULATIONS BY THE HIGHEST COURT OF THE STATE OF HAWAII.

It is well settled that property and liberty interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The sufficiency of a claim of entitlement must therefore be decided by reference to state law. Bishop v. Wood, 426 U.S. 341, 344 (1976). Moreover, when a state has interpreted a regulation in a particular way, as the highest court of Hawaii has done in this case, that construction must be accepted by a

federal court unless it is unreasonable. Id. at 346.

Important notions of federalism underlie this concept. To permit a federal court to simply disregard an informed and reasonable interpretation by the highest court of a state would substantially undermine this principle. In this case, because the Ninth Circuit Court of Appeals did not find the state court's construction of the Hawaii regulations unreasonable, the lower court decision must be reversed.

CONCLUSION

For the reasons stated above, the Commonwealth of Massachusetts, as amicus curiae, respectfully urges that the decision of the lower court be reversed.

Respectfully submitted,

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NO. 81-1581-CFX	TITLE Antone OLIM, et al., Petitioners v. Delbert Kaahanui Wakinekona

DOCKETED	COURT
Feb. 22, 1982	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Michael A. Lilly
	Counsel for Respondent: Robert Gilbert Johnston
Feb. 22, 1982	Petition for writ of certiorari filed. (Record filed).
Mar. 31, 1982	DISTRIBUTED. 4-16.
Apr. 5, 1982	Response requested.
May 6, 1982	Motion of respondent for leave to proceed in forma pauperi and brief in opposition filed.
May 12, 1982	DISTRIBUTED. 5-27.
June 1, 1982	The motion of respondent for leave to proceed in forma pauperis is GRANTED. The petition for a writ of certiorari is GRANTED.

July 8, 1982	Order extending time to file the joint appendix and and petitioners' brief on the merits until Aug. 16, 198
Aug. 13, 1982	Brief, amici curiae, of the States of Alaska, Arizona, et al. filed.
Aug. 16, 1982	Brief, amicus curiae, of the Commonwealth of Massachusetts and sister states filed.
Aug. 16, 1982	Brief of petitioners Antone Olim, et al. supporting revers filed.
Sept. 16, 1982	Order extending time to file the respondent's brief on the merits until Sept. 22, 1982.
Sept. 17, 1982	Joint appendix filed.
Sept. 23, 1982	Brief of respondent filed.
Nov. 17, 1982	CIRCULATED.
Jan. 19, 1983	ARGUED.